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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE SALDANA,

Petitioner,

—v.—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Is the habeas corpus exhaustion requirement satisfied when (a) the criminal defendant timely presents to a state court the constitutional basis for challenging his conviction, but (b) the state court does not rule on the constitutional question because of a misrepresentation by the prosecutor of the procedural history of the case?

2. Can the violation of a criminal defendant's constitutional right to due process be harmless error when (a) the due process violation is the arbitrary deprivation of a valuable state-created right under Evitts v. Lucey, 469 U.S. 387 (1985), and (b) the explicit statutory remedy for the deprivation of the state created right is the automatic, non-discretionary reversal of the conviction?

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IN THE

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October Term 1988

No. _____

JOSE SALDANA,

Petitioner,

- v. -

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Jose Saldana respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 27, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reversing the judgment of the United States District Court for the Southern District of New York, is reported at 850 F.2d 117 (1988) (Pet. App. 1-A).[1] The District Court's judgment granting the petition for a writ of habeas corpus is reported at 665 F. Supp. 271 (1987) (Pet. App. 22-A).

Petitioner was convicted upon a jury verdict of attempted murder in the first degree and related offenses, and was sentenced on October 1, 1981 to a term of imprisonment of from twenty-five years to life. Petitioner is currently imprisoned pursuant to the judgment of conviction. Following his trial, petitioner appealed,

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1 The citation "Pet. App. __" refers to the appendix to this petition.

pro se, to the Supreme Court of the State of New York Appellate Division, First Department, which affirmed his conviction, without opinion, on January 12, 1984. People v. Saldana, 99 A.D.2d 686, 471 N.Y.S.2d 727 (1st Dep't 1984). The New York Court of Appeals denied petitioner leave to appeal. People v. Saldana, 62 N.Y.2d 623, 476 N.Y.S.2d 1037 (1984).

JURISDICTION

The judgment of the Court of Appeals was entered June 27, 1988 (Pet. App. 122-A), and this petition was filed within 90 days thereafter. 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Fourteenth Amendment to the United States Constitu-

tion. U.S. Const. amend. XIV § 1 provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(b) provides in pertinent part:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State,
> . . .

Because the constitutional violation here is the arbitrary deprivation of a state-created right, the following New York constitutional and statutory provisions are involved:

N.Y. Const. art. 1, § 6

N.Y. Crim. Proc. Law § 190.50(5)(a)

N.Y. Crim. Proc. Law § 190.50(5)(c)

N.Y. Crim. Proc. Law § 210.20(1)(c)

N.Y. Crim. Proc. Law § 210.35

These constitutional and statutory provisions are reprinted at Pet. App. 129-A.

STATEMENT OF THE CASE

A. Statement of Issues

This case involves the requirement that a person first exhaust his state remedies before seeking habeas corpus review in federal court. It is undisputed that Mr. Saldana fairly raised the violation of his constitutional rights in state court. The Second Circuit ruled, however, that as a result of the District Attorney misrepresenting the procedural history of the case to the state appellate court, that court did not address the constitu-

tional issues and therefore Mr. Saldana failed to exhaust his state court remedies. Whether the State's own misconduct can form the basis for dismissing a habeas corpus petition on exhaustion grounds is the question presented for review.

This case also involves a person's right to seek redress in federal court for the unconstitutional deprivation of a valuable state-created right -- here, the right to testify before the grand jury considering whether to charge that person with a crime. New York affords such a right to any person against whom there is pending a felony complaint, and further provides that violation of that right can never be harmless, i.e., a conviction secured in violation of such right must be reversed as a matter of law.

As long ago as Griffin v. Illinois, 351 U.S. 12 (1956), and as recently as

Evitts v. Lucey, 469 U.S. 387 (1985), this Court held that states may create rights beyond the requirements of the constitution -- and that, once created, a state may not arbitrarily or irrationally withdraw them without offending due process. The Second Circuit held, however, that even if Mr. Saldana was unconstitutionally stripped of his state-created right to testify before the grand jury, he was not entitled to the mandatory reversal which is an integral part of the right. This case therefore raises the issue of whether a federal court, having found that a person has been unconstitutionally deprived of a state-created right, can refuse to provide the remedy which is explicitly required by the state and which is part and parcel of the right.

B. Grand Jury Rights and Remedies Enacted by New York State

New York conferred on Mr. Saldana several valuable state-created rights regarding his efforts to testify before the grand jury which ultimately charged him. First is the right under the New York State Constitution to be tried pursuant to a valid indictment:

> No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury.

N.Y. Const. art. 1, § 6.

Second is the right to testify before the grand jury which was considering whether to charge him with a crime.

> [A] person has a right to appear before such grand jury as a witness in his own behalf. . .

N.Y. Crim. Proc. Law § 190.50(5)(a).

Any grand jury proceeding which results in an indictment secured by the District Attorney in violation of a

defendant's right to testify renders the grand jury proceeding "defective," N.Y. Crim. Proc. Law § 210.20(1)(c) (emphasis added), and the indictment "invalid." N.Y. Crim. Proc. Law § 190.50(5)(c) (emphasis added). Upon timely motion of the defendant, such an indictment "must be dismissed." Id. (emphasis added). "This mandatory language creates what is a ministerial duty on the part of the court to dismiss an indictment obtained in violation of a defendant's right to appear before the Grand Jury." Borrello v. Balbach, 112 A.D.2d 1051, 1052, 492 N.Y.S.2d 822, 823 (2d Dep't 1985). Thus, under New York law, the deprivation of a defendant's right to appear before the grand jury can never be harmless.

New York considers the right to appear before the grand jury to be so fundamental that a subsequent conviction

beyond a reasonable doubt by a petit jury will not cure the violation, which is redressed by automatic reversal of the conviction on appeal. People v. Bey-Allah, 132 A.D.2d 76, 521 N.Y.S.2d 422 (1st Dep't 1987); People v. Gini, 72 A.D.2d 752, 421 N.Y.S.2d 269 (2d Dep't 1979).[2]

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2 The New York Court of Appeals has declined to follow the rule enunciated by this Court with respect to federal grand jury proceedings in United States v. Mechanik, 475 U.S. 66 (1986), that conviction after trial renders many grand jury defects harmless. In People v. Wilkins, 68 N.Y.2d 269, 508 N.Y.S.2d 893 (1986), the New York Court of Appeals stated:

> We decline the prosecutor's invitation to adopt the rule in United States v. Mechanik, 475 U.S. 66 [___] that conviction after trial renders a defect in Grand Jury proceedings harmless error. Our statute, CPL 210.35(5), provides for dismissal upon the mere possibility of prejudice, and we have consistently held that defects in Grand Jury proceedings . . . may be raised even after a plea of guilty.

Moreover, once denied the right to testify, the State cannot condition the exercise of the right before a new grand jury upon a disclosure by the defendant of the substance of his proposed testimony, People v. Jones, 126 Misc. 2d 104, 107, 481 N.Y.S.2d 594, 596 (Sup. Ct. Brooklyn Cty. 1984), or upon the defendant's appearance before the grand jury when the charges are re-presented, Borrello v. Balbach, 112 A.D.2d 1051, 1053, 492 N.Y.S.2d 822, 823 (2d Dep't 1985).

In order to invoke the right to testify before the grand jury, a person under investigation must "serve[] upon the district attorney of the county a written notice making [a request to appear before

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(Footnote 2 continued from previous page)

Id. at 277 n.7, 508 N.Y.S.2d at 897 n.7 (emphasis added) (citation omitted).

the grand jury] and stating an address to which communications may be sent." N.Y. Crim. Proc. Law § 190.50(5)(a). The unfair manner by which the prosecution trapped Mr. Saldana into alleged non-compliance with the statutory notice requirement forms the basis of Mr. Saldana's due process claim.[3]

C. Mr. Saldana's Attempts to Invoke His State-Created Rights

After his arrest in February 1980, but before the presentation of the case to the grand jury, Mr. Saldana wrote to the New York County Criminal Court stating

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3 Mr. Saldana contends that he did in fact comply with the notice provision under state law. If however, the notice provided by Mr. Saldana was not sufficient under state law, due process in any event prohibits the State from lulling him into the belief that he had satisfied the notice requirement and needed to take no further steps to safeguard his grand jury rights, as happened here.

that "it is my intention to exercise my right to appear before the grand jury and give testimony pursuant to C.P.L. 190.50." (2d Cir. App. 7).[4] See also 850 F.2d at 117 (Pet. App. 4-A). At the calendar call before Judge Murray Mogel on March 11, 1980, Mr. Saldana's court-appointed attorney repeated this request in open court. 850 F.2d at 117 (Pet. App. 4-A). The Second Circuit found that at that time "Judge Mogel inscribed on the official court record that 'D wishes to testify before GJ.'" 850 F.2d at 117-18 (Pet. App. 4-A).

At a subsequent calendar call in Criminal Court on March 19, 1980, Mr. Saldana appeared without benefit of his

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4 The citation "2d Cir. App." refers to the appendix filed by the State in the Second Circuit on September 4, 1987. See Second Circuit General Docket, (9/4/87) reprinted at Pet. App. 124-A.

court-appointed lawyer, who was out of the country. At the start of the proceeding, Judge Mogel notified the Assistant District Attorney that:

> This is a case where the defendant also wishes to testify before the Grand Jury.

(2d Cir. App. 9).

When, later in the same proceeding, the Assistant District Attorney moved to dismiss the case from the Criminal Court with leave to present it to the grand jury, Mr. Saldana interrupted, and again asked that he be permitted to testify before the grand jury, and the State promised in open court to write down his request:

> THE DEFENDANT: Well, your Honor, if this case is going to be presented to the Grand Jury later on, I would also like to testify in front of the Grand Jury in my own behalf at that time.

> MR. TENDY [A.D.A.]: I'll also note that on the D.A.'s papers, Judge.
>
> THE COURT: All right.

(2d Cir. App. 10-11; see also 850 F.2d at 118 (Pet. App. 4-A); (emphasis added).

Despite these unequivocal requests to testify by Mr. Saldana -- and the equally straightforward assurances by the District Attorney that he would write down Mr. Saldana's request -- Mr. Saldana was denied his right to appear and testify before the grand jury, which indicted him on May 16, 1980, without hearing his testimony. 850 F.2d at 118 (Pet. App. 5-A). During this time, Mr. Saldana was without the benefit of counsel, since his court appointed attorney ceased to represent him after the criminal complaint was dismissed and while the case was being presented to the grand jury. 850 F.2d at 118 (Pet. App. 4-A).

Mr. Saldana was arraigned on September 15, 1980. 850 F.2d at 118 (Pet. App. 5-A). By motion dated September 15, 1980 -- within the five-day period permitted by statute (N.Y. Crim. Proc. Law § 190.50(5)(c)) Mr. Saldana, still pro se, moved before Justice Burton Roberts of New York Supreme Court to dismiss the indictment. Mr. Saldana complained that he had

> requested before the Criminal Court presiding justice . . . and in the presence of the prosecuting attorney for permission to testify on my own behalf. This request was never granted although my request was made in open Court.

850 F.2d at 118 (Pet. App. 5-A). Incredibly, the Assistant District Attorney's affidavit in opposition to Mr. Saldana's motion stated that "the defendant failed to serve written notice" (2d Cir. App. 15) of his desire to appear before the grand

jury on the District Attorney -- despite Mr. Saldana's written letter to the Criminal Court, his transcribed oral requests in open court, and the District Attorney's explicit promise to write down Mr. Saldana's request.

As the Second Circuit recognized, the District Attorney took advantage of the fact that Mr. Saldana was now before a new judge who did not know of the State's prior assurance to Mr. Saldana to "note that [request] on the D.A.'s papers." The Court of Appeals found that:

> The State did not tell Justice Roberts about [Mr.] Saldana's letter to the criminal court or that he notified the State on the record at the March 11 calendar call of his desire to testify. Nor did the prosecutor apprise Justice Roberts that the State had agreed to make a written note of defendant's request at the March 19 calendar call.

850 F.2d at 118 (Pet. App. 5A, 6A). On the basis of this misrepresented record,

Justice Roberts denied the motion because of the failure to file the written notice. See 850 F.2d at 118 (Pet. App. 6-A).

In the Appellate Division, Mr. Saldana, appealing pro se, complained that the indictment should have been dismissed because he was denied the opportunity to testify before the grand jury. In his brief to the Appellate Division, Mr. Saldana set forth all of the essential factual allegations which constitute the basis of his due process claim. Mr. Saldana stated that he sent a letter to the Criminal Court judge expressing his desire to appear before the grand jury (2d Cir. App. 19); that Judge Mogel of the Criminal Court gave the D.A. notice of that request on the record (2d Cir. App. 24-25); that Mr. Saldana so informed the court and the D.A. on the record on March 19, 1980 (2d Cir. App. 20); and that the

D.A. promised to make a note of the request on the D.A.'s papers (2d Cir. App. 24).

Mr. Saldana also set forth the legal premise of his claim in his brief to the Appellate Division. He concluded by asserting that he was "unlawfully tried on an invalid indictment and subsequently denied his constitutional right to due process of law under the Fifth and Fourteenth Amendment of the United States Constitution." (2d Cir. App. 28).

The District Attorney responded to Mr. Saldana's arguments with a new allegation that it had not raised before the trial court. It argued that Mr. Saldana's motion to dismiss the indictment, although dated September 15, 1980, was not filed until October 17, 1980, more than five days after arraignment as required by N.Y. Crim. Proc. Law

§ 190.50(5)(c). Therefore, the D.A. argued, the motion to dismiss was untimely and the issue not properly preserved for appeal. The State also repeated its argument that Mr. Saldana had not served written notice of his desire to testify. Although the State did not admit it until it produced a date-stamped copy of Mr. Saldana's motion to dismiss in these habeas corpus proceedings, it is now undisputed that "the State's position on this issue in the Appellate Division was erroneous because Saldana's motion was in fact, timely made." 850 F.2d at 118 (Pet. App. 7-A).

As the Second Circuit recognized, 850 F.2d at 118 (Pet. App. 7-A), Mr. Saldana refuted the State's contention of untimeliness in his reply brief, asserting that:

> Contrary to the People's argument, the defendant's pro-se motion and affidavit moving to dismiss the indictment . . . was timely submitted. The motion is dated September 15, 1980, and was mailed, with the proper postage, to the Supreme Court of New York County, part 70, on September 16, 1980. . . .

(2d Cir. App. 32).

However, the Appellate Division had no independent way of knowing that Mr. Saldana was being truthful in his brief since, as the Second Circuit found, "[t]he Appellate Division did not have before it a copy of Saldana's date-stamped motion to dismiss the indictment." 850 F.2d at 118 (Pet. App. 7-A).

With the State again misrepresenting the procedural history of the case, the Appellate Division affirmed Mr. Saldana's conviction without opinion on January 12, 1984. People v. Saldana, 99 A.D.2d 686, 471 N.Y.S.2d 727 (1st Dep't 1984). The New York Court of Appeals denied leave to

appeal. People v. Saldana, 62 N.Y.2d 623, 476 N.Y.S.2d 1037 (1984).

D. The Holding of the District Court

The jurisdiction of the District Court was based upon 28 U.S.C. § 2241.

On July 10, 1987 the District Court granted Mr. Saldana's petition. Citing Evitts v. Lucey, 469 U.S. 387, it found that "once a state has created a right, such as that of a defendant to appear before a grand jury, it cannot cause that right to be forfeited in a manner which is arbitrary or fundamentally unfair" (665 F. Supp. at 275 (Pet. App. 32-A)) and that New York was therefore required to "conform conditioning of [the right to appear before a grand jury] to the requirements of the Due Process Clause." Id. at 276 (Pet. App. 34-A). The District Court held that the notice given by Mr.

Saldana in this case was "sufficient to preserve his right to testify before the grand jury and that the Due Process Clause was violated by not allowing [Mr. Saldana] to testify." Id. at 279 (Pet. App. 46-A).[5]

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5 Prior to the District Court's grant of Mr. Saldana's petition, he had petitioned the District Court, pro se, for a writ of habeas corpus on June 18, 1984. On January 31, 1985 the District Court dismissed the petition on exhaustion grounds. Memorandum Order 1/31/85, Pet. App. 103-A. Upon rehearing, the District Court addressed the merits of the petition but on October 11, 1985 again dismissed the petition, holding that the denial of Mr. Saldana's right to testify on his own behalf before the grand jury -- which Mr. Saldana mischaracterized as a denial of his right to effective assistance of counsel -- did "not amount to a federal constitutional violation." Memorandum Order 10/11/85, Pet. App. 73-A. Mr. Saldana then appealed to the Court of Appeals upon the District Court's certificate of probable cause. Counsel was assigned by the Second Circuit -- the first time Mr. Saldana had been represented by counsel since his trial -- and applied for a remand to the District Court. The Second Circuit remanded

On harmless error, the District Court held that the denial of Mr. Saldana's constitutional rights must be found to be prejudicial as a matter of law. The District Court looked to New York law to determine whether the deprivation of Mr. Saldana's rights was harmless because his "right to appear before a grand jury is state created and the finding of constitutional error is predicated on the State's failure to afford [Mr. Saldana] procedural due process." Id. at 280 (Pet. App. 48-A). Citing N.Y. Const. art. 1, § 6, and N.Y. Crim. Proc. Law §§ 210.35 and 190.50(5)(c), the District Court held that

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(Footnote 5 continued from previous page)
the case, after the District Court agreed to consider the case further. On remand to the District Court, Mr. Saldana amended his petition to assert that the arbitrary denial of his state-created right to testify before the grand jury deprived him of his federal constitutional rights to due process and equal protection.

"[u]nder New York law a violation of a defendant's right to testify before the grand jury can never be harmless" (665 F. Supp. at 280 (Pet. App. 48-A)) (emphasis added) and that "a subsequent conviction will not cure the deprivation of grand jury rights . . . ." Id. at 280 (Pet. App. 49-A).

E. The Holding of the Court of Appeals

On appeal, the Second Circuit reversed. 850 F.2d 117 (1988) (Pet. App. 1-A). Although the Court of Appeals found that "[i]n his reply brief, Saldana refuted" the State's argument that Mr. Saldana's motion to dismiss the indictment was untimely and that "the State's position on this issue in the Appellate Division was erroneous," 850 F.2d at 118 (Pet. App. 7-A), it held that, because the state courts were "not advised" by the

District Attorney that Mr. Saldana's motion to dismiss the indictment was timely, those courts "have not passed upon the question whether the denial of [Mr.] Saldana's rights" constituted denial of due process and that therefore Mr. Saldana had failed to exhaust his state remedies. 850 F.2d at 119 (Pet. App. 12-A).

Second, while assuming a violation of Mr. Saldana's constitutional right to due process, the Second Circuit found, as a matter of fact, that Saldana was not prejudiced by the denial of his right to appear before the grand jury. The Court of Appeals did not even address Mr. Saldana's principal argument on harmless error -- an argument which was accepted and relied upon by the District Court -- namely, that as a matter of law, this deprivation of due process cannot be harmless.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A DANGEROUS PRECEDENT BY REWARDING THE PROSECUTOR FOR MAKING FALSE STATEMENTS, AND IS IN CONFLICT WITH THIS COURT'S DECISIONS REGARDING THE EXHAUSTION REQUIREMENTS

The Second Circuit held that Mr. Saldana did not satisfy the exhaustion requirement because the state courts "have not passed upon the question whether the denial of [Mr.] Saldana's rights" amounted to a constitutional deprivation of due process. 850 F.2d at 119 (Pet. App. 12-A). The reason this was so, according to the court, was not due to any fault of Mr. Saldana's, who timely presented his constitutional arguments in state court. Rather, the blame lay with the District Attorney, who erroneously advised the state court that "the issue was . . . not preserved for appeal" because "[Mr.] Saldana's motion to dismiss was

untimely." 850 F.2d at 118 (Pet. App. 7-A).

The Court of Appeals' holding creates a dangerous precedent, perversely rewarding the District Attorney for making a false statement to the state court. Moreover, the decision places an impossible burden on prisoners seeking resolution of their constitutional claims, in effect giving prosecutors the power to filibuster federal habeas corpus proceedings by withholding evidence favorable to the prisoner in state court -- and then arguing that the exhaustion requirement is not satisfied because the state court has never reviewed the evidence. Review by this Court is needed to correct such unsavory tactics by state district attorneys. Moreover, the Second Circuit's decision is in direct conflict with numerous decisions of this Court.

Contrary to the Second Circuit's holding -- which is not supported by a single citation -- this Court has never mandated that state courts actually decide the federal constitutional issues in order for the exhaustion requirement to be satisfied. Rather, as this Court has frequently held, the purpose of the exhaustion doctrine is "to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Picard v. Connor, 404 U.S. 270, 275 (1971) (emphasis supplied). Accord, Vasquez v. Hillery, 474 U.S. 254, 257 (1986); Wilwording v. Swenson, 404 U.S. 249, 250 (1971); Fay v. Noia, 372 U.S. 391, 438 (1963).

A prisoner satisfies his obligation to "give the State an initial opportunity" to rule on a constitutional question by fairly presenting the constitutional issue

in state court. "Once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." Picard, 404 U.S. at 275; Vasquez, 474 U.S. at 257 (emphasis added). Indeed,

> It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court. . . .

Smith v. Digman, 434 U.S. 332, 333 (1978). The Court of Appeals' decision is diametrically opposed to this holding.

The Court of Appeals found that Mr. Saldana's constitutional claim "was not before the New York courts on the facts which now seem settled and undisputed." 850 F.2d at 119 (Pet. App. 11-A). But there is no dispute that Mr. Saldana

fairly presented all his arguments to the state court. The only issue is whether the Appellate Division was misled into deciding Mr. Saldana's claim on an erroneous procedural ground because the State withheld from the Appellate Division the date-stamped motion which it produced in these habeas corpus proceedings.

The exhaustion doctrine does not require that Mr. Saldana be bounced back and forth between state and federal courts like a yo-yo -- just because the State chooses to disclose in federal court evidence which it had in its possession, but did not disclose, in state court. As the Eighth Circuit stated in Austin v. Swenson, 522 F.2d 168, 170 n.5 (8th Cir. 1975), a "due respect for comity does not require that federal proceedings be halted each time the state produces additional evidence potentially favorable to the

petitioner". Or, as this Court put it in Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490 (1973): the exhaustion doctrine "cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence".[6]

There can be no reasonable dispute that Mr. Saldana did everything within his power to exhaust his state remedies. Imprisoned and without the benefit of counsel, Mr. Saldana could not reasonably be expected to have obtained a

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6 The exhaustion doctrine is intended to encourage state prisoners to seek full relief first from state courts. Rose v. Lundy, 455 U.S. 507, 519. As the statute itself says: the application shall not be granted "unless it appears that the applicant has exhausted" his state court remedies. 28 U.S.C. § 2254(b) (emphasis added).

date-stamped copy of his motion to dismiss the indictment from the District Attorney's file any sooner. Townsend v. Sain, 392 U.S. 293, 316-17 (1963) (federal court must consider "newly discovered evidence . . . which could not reasonably be presented to state trier of facts"); Vasquez v. Hillery, 474 U.S. 254, 257-58 (1986) ("We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts").[7]

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7 While the State was not under a direction from the District Court to produce a date-stamped copy, it is reasonable to conclude that the District Attorney was encouraged to produce the date-stamped copy by Judge Broderick's stinging criticism in the District Court: "What other parts of the record respondent may still have failed to disclose I do not know. I do not intend to speculate. Given respondent's performance to date, however, I would

The Second Circuit's decision turns the exhaustion doctrine on its head. Review by this Court is required to assure that the exhaustion doctrine is not misused to penalize prisoners for a state's withholding of evidence and misrepresentations to the state courts.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DUE PROCESS DECISIONS OF THIS COURT AND UNDERMINES CORE VALUES OF FEDERALISM

This Court has held over and over again that the arbitrary denial of a state-created right is a violation of due process. Griffin v. Illinois, 351 U.S. 12, 18 (1956); Evitts v. Lucey, 469 U.S.

(Footnote 7 continued from previous page) be loathe indeed to decide the exhaustion issue on the record presently before me." Memorandum Order, October 11, 1985, p. 3 (Pet. App. 76-A). Moreover, the State was certainly under an ethical obligation to produce the document. Brady v. Maryland, 373 U.S. 83 (1963).

387, 400-01 (1985). Accord, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982); Goss v. Lopez, 419 U.S. 565, 574 (1975); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

Based on this long line of authority, the District Court properly concluded that New York violated due process when it ambushed Mr. Saldana into forfeiting his grand jury rights. This ambush occurred when the District Attorney promised in open court to make a written note of Mr. Saldana's request to testify before the grand jury and then (after breaking its promise to write down Mr. Saldana's request and ignoring all the other forms of written and oral notice provided by Mr. Saldana) successfully argued to a new

judge that proper written notice had not been provided.

The Court of Appeals did not quarrel with the District Court's finding that due process was violated. Indeed, the court stated that Mr. Saldana had made a "strong showing" that he was deprived arbitrarily of his right to testify before the grand jury. 850 F.2d at 119 (Pet. App. 11-A). The court found, however, that the denial of due process in this case was harmless, ostensibly because Mr. Saldana's testimony could not have influenced the grand jury.[8]

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8 The Second Circuit stated that the State's case presented at the trial was "largely uncontradicted by petitioner." 850 F.2d at 119 (Pet. App. 13-A). Nothing could be further from the truth. Mr. Saldana devoted no less than five pages of his brief to the Court of Appeals controverting the distorted version of the evidence contained in the State's brief to that court. See Saldana Brief to the Second Circuit, pp. 13-18 (Pet. App. 125-A, 10/5/87).

By engaging in rank speculation about what Mr. Saldana's testimony could have accomplished as a matter of fact, the Second Circuit completely ducked the cornerstone legal issue in this case -- an omission made all the more glaring by the fact that the avoided question formed the basis of the District Court's decision and was Mr. Saldana's lead argument on appeal. That legal issue is whether the unconstitutional deprivation of a state-created right can be harmless when the state which created the right provides that the deprivation can never be harmless. Put another way, can a federal court which has found that a prisoner has been deprived unconstitutionally of a state-created right refuse to provide the state-created remedy which is an integral part of the right -- here, the automatic, non-discretionary reversal of Mr. Saldana's conviction.

Fundamental principles of federalism are at stake. What the Second Circuit has done, in effect, is to second guess New York State as to the importance attached to the right to testify before the grand jury and the seriousness of the deprivation when such right is abridged. It is not for a federal court to say that the substance of a defendant's testimony before the grand jury should weigh in the decision of whether the conviction should be reversed when the state which has created the right said it should not. And New York unequivocally requires dismissal of the prosecution even after conviction at trial,[9] and even when the substance of the proferred grand jury testimony is not

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9 People v. Bey-Allah, 132 A.D.2d 76, 521 N.Y.S.2d 422 (1st Dept. 1987); People v. Gini, 72 A.D.2d 752, 421 N.Y.S.2d 269 (2d Dept. 1979).

disclosed.[10]

Prior decisions of this Court, upon a finding of a due process violation based on deprivations of state-created rights, have redressed the wrong by providing the state-created remedy, without subjecting the due process violation to any further harmless error analysis. In Griffin v. Illinois, 351 U.S. 12 (1956), Illinois created a state right to an appeal from a criminal conviction but conditioned the exercise of the right on the filing of the entire record, including a stenographic transcript of the proceeding. Id. at 13. Griffin, an indigent, sought a copy of the record free of charge, which request was denied by the Illinois state courts. This Court reversed, holding that "a State that

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10 People v. Jones, 126 Misc. 2d 104, 481 N.Y.S.2d 594 (Sup. Ct. Brooklyn Cty. 1984).

does grant appellate review [cannot] do so in a way that discriminates against some convicted defendants on account of their poverty." Id. at 18. Accordingly, the case was remanded to the state with a direction to "provide corrective rules to meet the problem which this case lays bare," id. at 20, namely, providing Griffin with a free transcript so that he could exercise his right to appeal.

In Evitts v. Lucey, 469 U.S. 387 (1985), this Court held that the right to appeal could not be arbitrarily denied by the appointment of incompetent counsel who, by a procedural error, denied his client his state-created right to appellate review of his conviction. To redress this constitutional violation, this Court affirmed the holdings of the district court and court of appeals which had ordered that the defendant be given his

state-created remedy -- either that he be retried or that his appeal be reinstated. Id. at 390.

This was precisely the approach followed by the District Court in the present case. The District Court remedied the due process violation by vacating Mr. Saldana's conviction and dismissing the invalid indictment, with a direction to provide Mr. Saldana with an opportunity to testify before the grand jury if the State decided to seek a new indictment. 665 F. Supp. at 283 (Pet. App. 60-A). As the District Court held:

> Since the State of New York has chosen to give a putative defendant the statutory right to appear before a grand jury, it must conform the conditioning of that right to the requirements of the Due Process Clause.

Id. at 286 (Pet. App. 34-A).

In contrast, here the Court of Appeals disregarded both Griffin and

Evitts -- indeed, it cited neither of them. Instead, the Court of Appeals engaged in unwarranted speculation concerning what it presumed would have been the substance of Mr. Saldana's testimony had he been permitted to testify before the grand jury. 850 F.2d at 121 (Pet. App. 20-A, 21-A).

Such an approach is in clear conflict with the decisions of this Court which hold that a federal court cannot so artificially decapitate the state remedy from the state right which has been unconstitutionally abridged. That is why in Griffin and Evitts, this Court granted the defendants their state created right -- the right to appeal -- without evaluating whether either defendant had a potentially meritorius appeal. Under the rationale of the Second Circuit, this Court would first have assessed whether

Griffin's or Evitt's appeals could have resulted in reversal of their convictions. Only then would Griffin have been entitled to a free transcript or Evitts entitled to reinstatement of his appeal.

In short, the Second Circuit's decision undermines long-established Supreme Court precedent regarding the rights -- and remedies -- of those deprived of due process by the arbitrary denial of state-created rights. The Court should grant the instant petition in order to redress this disregard for precedent.

CONCLUSION

For the reasons stated, a petition for a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Dated: September 26, 1988

Respectfully submitted,
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 512 August Term, 1987

Argued: 12/11/87 Decided: 6/27/88

Docket No. 87-2298

JOSE SALDANA,

Petitioner-Appellee,

against-

THE STATE OF NEW YORK,

Respondent-Appellant.

Before: LUMBARD, OAKES, and PRATT,
Circuit Judges.

Appeal from an order of the Southern District, Broderick, J., granting appellee's petition for a writ of habeas corpus. Finding that petitioner has not exhausted his State remedies and that the failure of the State to allow appellee to appear before the grand jury was, in any event, harmless, we reverse the order of

the district court and dismiss the petition.

STEVEN GLICKSTEIN, New York, N.Y. (Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., Louis H. Benjamin, Patrick M. McGovern, of counsel), for Petitioner-Appellee.

ANN M. DONNELLY, Assistant District Attorney, New York County (Robert M. Morgenthau, District Attorney, New York County, Normal Barclay, Assistant District Attorney, New York County, of counsel), for Respondent-Appellant.

LUMBARD, Circuit Judge:

The State appeals from an order of the Southern District, Broderick, J., entered July 10, 1987, which granted Saldana's petition for a writ of habeas corpus and vacated his jury conviction in New York County entered in July 1981, for attempted murder in the first degree, and related charges. Saldana was sentenced, as a predicate felon, to concurrent prison terms of from 25 years to life, and lesser terms on the other counts, to run consecutively to a federal sentence for bank robbery which he is now serving.

The district court found that Saldana had been denied due process because the district attorney presented the case to the grand jury without allowing Saldana the opportunity to testify before the grand jury as provided by the New York Criminal Procedure Law upon request of a

defendant. N.Y. Crim. Proc. Law § 190.50(5)(a).

We reverse and dismiss the petition.

After his arrest in February, 1980, but before indictment, Saldana wrote to Judge Mogel of the Criminal Court that he intended to appear before the grand jury. At the calendar call before Judge Mogel on March 11, 1980, Saldana's attorney repeated his wish to appear before the grand jury. Judge Mogel inscribed on the official court record that "D wishes to testify before GJ." The calendar call was continued until March 19, at which point Saldana appeared without counsel and orally repeated his request. In response, the assistant district attorney assigned to the part told the judge that he would note the request on the district attorney's papers.

The grand jury indicted Saldana on May 16, 1980, without hearing his testimony. When he was arraigned on September 15 before Justice Burton Roberts, Saldana timely moved, again pro se, to dismiss the indictment complaining that he had "requested before the Criminal Court presiding justice . . . and in the presence of the prosecuting attorney for permission to testify on my own behalf. This request was never granted although my request was made in open Court." Assistant District Attorney Warren Murray told the court that Saldana had failed to serve written notice as required by § 190.50(5)(a). The State did not tell Justice Roberts about Saldana's letter to the criminal court or that he notified the State on the record at the March 11 calendar call of his desire to testify. Nor did the prosecutor apprise Justice

Roberts that the State had agreed to make a written note of defendant's request at the March 19 calendar call. Justice Roberts denied the motion because of failure to file the written notice.

The indictment charged Saldana and Maliki Latine with attempted murder in the first degree, assault in the first degree and four counts each of criminal possession of a weapon and criminal possession of stolen property in the third degree. After four weeks of trial the jury convicted them as charged. On October 1, 1981, Saldana was sentenced.

In the Appellate Division, Saldana (appealing pro se), in addition to alleging insufficient evidence and errors of the district attorney and of his own counsel, complained that the indictment should have been dismissed because he was denied the opportunity to testify before

the grand jury. The State responded that Saldana had not filed written notice of his desire to testify as required by § 190.50(5)(a). The State also argued that Saldana's motion to dismiss was untimely and that the issue was, therefore, not preserved for appeal. In his reply brief, Saldana refuted this point. As conceded by the State during oral argument before this court, the State's position on this issue in the Appellate Division was erroneous because Saldana's motion was in fact, timely made. The Appellate Division did not have before it a copy of Saldana's date-stamped motion to dismiss the indictment. After unanimous affirmance without opinion on January 12, 1984, 99 A.D.2d 686 (1st Dept. 1984), the New York Court of Appeals denied leave to appeal.

Saldana petitioned the district court for a writ of habeas corpus on June 18, 1984. The district court originally dismissed the petition on exhaustion grounds. On rehearing, Judge Broderick reviewed on the merits Saldana's four claims, one of which was that he was denied effective assistance of counsel because his attorney failed to serve the district attorney with written notice of Saldana's intent to appear before the grand jury. The district court again dismissed the petition on October 11, 1985. Among other things, Judge Broderick concluded that "while the failure to provide a target the opportunity to testify on his own behalf may create the appearance of inequity . . . it does not amount to a federal constitutional violation" and accordingly, Saldana, "was not constitutionally prejudiced" by failure of his

counsel. In addition, the court wrote that Saldana had not shown that he would have "provided any information to the grand jury that might have persuaded the grand jury not to indict him." The court rejected Saldana's other contentions.

After Saldana appealed to us on the district court's certificate of probable cause, we assigned counsel who applied to the district court for rehearing. We remanded when the district court agreed to consider the case further.

On remand, Saldana renewed his ineffective assistance claim and two additional claims: that by denying him the right to appear before the grand jury, the State had violated his rights to due process and equal protection. The district court about-faced on July 10, 1987, and granted Saldana's petition. Judge Broderick held that because Saldana had

substantially complied with New York's statute, he was denied due process by the State's failure to allow him to appear to testify. He also concluded that the error was not harmless because the State had not met its burden of proving harmlessness beyond a reasonable doubt.

We reverse and dismiss the petition for two reasons: First, Saldana has failed to exhaust his State remedies; the New York Courts have not had the opportunity to consider whether the actions of the district attorney violated Saldana's constitutional rights to due process and equal protection. 28 U.S.C. § 2254(b).

Second, we find that there is no reason to believe that Saldana's appearance and testimony before the grand jury could have resulted in any different action by the grand jury. Consequently,

we conclude that the State's error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Saldana makes a strong showing that the action of the district attorney, whether careless or intended, denied him the right under New York law to appear before the grand jury which was considering his case. However, he has not exhausted his remedies before the State courts regarding the crucial question whether the State's disregard of his repeated and timely requests to appear before the grand jury denied his constitutional rights to due process and equal protection under the law. Indeed, that question was not before the New York courts on the facts which now seem settled and undisputed. It now appears, and the State concedes, that Saldana did make timely application for dismissal of the

indictment, and that Justice Roberts, who denied Saldana's motion to dismiss, was not advised of this by the district attorney. Nor were the facts brought to the attention of the Appellate Division which we must assume affirmed the denial to dismiss on the procedural ground that it was not timely made. See Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir. 1986). Thus, the New York courts have not passed upon the question whether the denial of Saldana's rights was of such dimension and nature to constitute denial of due process, or whether New York law requires that the indictment be dismissed.

We conclude, however, that instead of dismissing the petition for failure to exhaust remedies, in the interests of judicial economy, we should reverse and dismiss the writ because, regardless of what the State courts might decide upon

further consideration of the federal issue, Saldana has not suffered any harm to justify relief under federal law in federal court. Of course, this dismissal is not meant to prejudice any relief which may still be available to Saldana under state law in the New York courts.

Saldana is not entitled to relief in the federal courts because the State's failure to allow him to testify before the grand jury could not have made any constitutional difference because he suffered no prejudice. A review of the State's case presented at the trial (as recited in the People's brief, and largely uncontradicted by petitioner), shows how unlikely it is that any testimony by Saldana himself -- if indeed he would ever have testified -- could have made any difference in the charges filed by the grand jury.

The evidence established that between 2:00 and 3:00 a.m. on July 3, 1973, Locksley Green, a gypsy taxicab driver had an accident with a blue Malibu in upper Manhattan. The Malibu, which was stolen, was driven by Jamal Thomas. With Thomas were three passengers -- Saldana, Latine and Aikel Shakur.

After the accident, Thomas stopped the Malibu and spoke briefly with Green and the manager of the taxi service, Horace Neufville, who had arrived shortly after the accident occurred. After determining that Thomas possessed neither a license nor a car registration, Neufville walked back to his car to call his company. At that point, Thomas jumped in his car and drove away, with the two taxi drivers in pursuit.

Saldana then jumped out of the slowly moving Malibu and fired a gun at the

taxis, shattering the driver's window and putting bullet holes in the door and left front bumper of Green's cab and hitting the driver's side of Neufville's car. Green eventually saw some police officers to whom he described the Malibu.

After the accident and the shooting, the four men drove to the apartment of Dolores Dubois and Donnel Brown. They were acquainted with Brown through Kareem C'Allah, Dubois' son. Accordingly to Brown, they were heavily armed: Shakur and Saldana were both carrying .357 magnums and Latine was carrying a shopping bag that contained a sawed-off shotgun, a .45 caliber pistol (which he handed to Thomas), and a green gun-cleaning kit. Shakur explained that they had been in an accident. Saldana added that he had shot at the cabs to prevent them from following them. Ms. Dubois became upset that the

men had brought guns into the apartment, and ordered them to leave, giving them $3.00 to take a taxi.

In the meantime, officer Joseph Monteleone and Sergeant Patrick Pellicano who were on patrol in a marked police car received a radio alarm describing the shooting, and the car involved: a 1976 blue Chevrolet Malibu, with license number 242ZHA. At 4:40 a.m., they spotted the stolen Malibu. The officers radioed for assistance, followed the car until it stopped several blocks later and stopped their own car about a car-length away.

The officers then got out of the car with their guns drawn. Officer Monteleone approached the driver's side of the Malibu, while Sergeant Pellicano went up to the passenger side. Both officers testified that at that point, there appeared to be three men in the car: two

in the front seat and one alone in the back. As they neared the car the man in the backseat "suddenly" dropped out of sight, and Latine appeared in the rear seat holding a shotgun, which he fired at Sergeant Pellicano through the window. Sergeant Pellicano's face "exploded" and he felt "extreme pain" in his right eye. In addition, his left eye was "full of blood," blinding him. He yelled, "I'm hit, I can't see." Nevertheless, he fired his gun in the direction of the Malibu.

At that point, Jamal Thomas leaped from the driver's seat, empty-handed, and ran. When the rear door on the driver's side opened, Officer Monteleone saw a handgun, a man crouched on the floor, and a man lying on the backseat. He fired six shots, and then returned to the patrol car to reload and to call for help. Sergeant Pellicano was staggering and was

"drenched" with blood, and said that he could not see the car. Officer Monteleone ran to him, brought him back to the police car, and then drove him to the hospital.

After the shootings, back-up officers and detectives arrived at the scene. They found two discharged twenty-gauged shotgun shells and one live twenty-gauged shell on the back seat of the Malibu and a fully loaded .45 semi-automatic pistol on the front seat. In addition, they found a .357 magnum next to the front wheel on the driver's side containing three discharged shells and a recently fired twenty-gauge shotgun twenty feet from the front of the car. A plastic bag containing ammunition, a gun-cleaning kit, and a pair of hand-cuffs were also recovered from the back seat. Brown testified that the guns and cleaning kit resembled the ones that Saldana and the other gunmen had shown him

prior to the shooting. Saldana's fingerprints were found on the car, on the handcuffs and on an oil can found in the car.

Sometime during the afternoon of July 3rd, Saldana and Donnel Brown walked together to Edgecomb Park. Brown had seen a television report about the shooting and asked Saldana what happened. Saldana explained that once the car had been stopped and the shooting had begun, Latine had refused to shoot at the officers. Saldana claimed to have aimed his pistol at Latine's head and ordered him to "open fire." After Latine fired the shotgun, which was fortunately loaded only with birdshot, Saldana said he heard one officer yell "I'm hit, I'm hit" and the other say, "Sarge, are you hurt?" Saldana then fled from the car leaving his empty gun behind.

Saldana stated that if the police came for him, he would "shoot it out" with them. During the next few days, Brown relayed messages between the gunmen. During this time, Saldana advised him that the police has confiscated photographs of them from a friend's girlfriend and knew who they were.

We do not know what Saldana could have testified to before the grand jury. At trial he chose not to take the stand. At most, he could have claimed that he had no part in Latine's shotgun blast at Sergeant Pellicano. Against this were his admissions to Brown that he forced Latine to shoot, and other circumstantial evidence of his presence at the scene.

Had Saldana testified before the grand jury he would have been cross-examined about his criminal record. The State advises us that Saldana was

convicted in 1971 for two separate robberies, and in 1974 for criminal possession of a weapon. Apparently his conviction for federal bank robbery, for which he is now serving a sentence, did not occur until after his indictment for attempted murder. It passes the bounds of credulity to believe that by his testimony Saldana could have helped himself in any respect. Any defense counsel would have strongly advised Saldana not to appear. In fact, Saldana's brief to the Appellate Division indicates that his defense lawyer so advised him. At best, his appearance would have crippled his defense at trial.

In short, we conclude that under the federal constitutional standard Saldana was in no way prejudiced by not being given the opportunity to appear before the grand jury.

Reversed; the petition is dismissed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X
JOSE SALDANA, :

Petitioner, :

84 Civ. 5254 (VLB)
-against- : MEMORANDUM ORDER

THE STATE OF NEW YORK, :

Respondent. :
----------X

VINCENT L. BRODERICK, U.S.D.J.

I.

Petitioner Jose Saldana ("Saldana") originally filed this petition for habeas corpus pro se on June 18, 1984. After ordering the respondent State of New York (the "State") to respond, I denied the petition on exhaustion grounds on January 31, 1985. Petitioner then moved for rehearing. I granted that application and then denied the petitioner for habeas corpus relief on the merits. I declined to appoint counsel for petitioner.[1] After I issued a certificate of probable cause,

petitioner appealed.

During the pendency of his appeal, petitioner, now represented by counsel,[2] moved for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and requested the Second Circuit to remand this action to me for further proceedings. By letter endorsement dated August 19, 1986, I expressed my inclination to grant petitioner's motion for relief from judgment, and requested that the Court of Appeals remand the matter for further proceedings.

Petitioner has now moved to amend his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2242 to set forth two additional grounds for relief: (1) that respondent denied petitioner's right to appear before the grand jury in violation of the Due Process Clause of the 14th Amendment, and (2) that respondent's

denial of petitioner's grand jury rights was in violation of the Equal Protection Clause of the 14th Amendment. The motion to amend is granted.

II.

This case arises out of a shooting incident on July 3, 1979, in Manhattan. Two police officers, observing a car fitting the description of a car reported stolen, followed the car. When it stopped, they approached it with their guns drawn. A shotgun was fired from the car, wounding one of the two police officers in the eye. Subsequently, petitioner was arrested in connection with this matter on February 8, 1980.

On February 28, 1980, shortly after his arrest but prior to any indictment, petitioner sent a letter to the New York County Criminal Court Judge stating his intention to exercise his right to appear

before the grand jury pursuant to N.Y. Crim. Proc. L. § 190.50(5)(a).[3] A calendar call was held before Criminal Court Judge Murray Mogel on March 11, 1980 in which Harold Schwartz, petitioner's attorney, orally indicated petitioner's wish to testify before the grand jury. Judge Mogel inscribed in the official court record: "D wishes to testify before GJ."[4] The March 11 calendar call was continued until March 19, 1980.

At the March 19 calendar call, petitioner appeared without counsel, who was out of the country. At the beginning of the proceeding, Judge Mogel notified the assistant district attorney of petitioner's wish to testify before the grand jury. Later in the proceeding, the assistant district attorney moved to dismiss the case with leave to present it to the grand jury. As the judge granted

the motion, the following exchange took place:

> THE DEFENDANT: Well, your honor, if this case is going to be presented to the Grand Jury later on, I would also like to testify in front of the Grand Jury in my own behalf at that time.
>
> MR. TENDY [A.D.A.]: I'll also note that on the D.A.'s papers, Judge.
>
> THE COURT: All right.

(Emphasis added).

Petitioner never appeared before the grand jury. The grand jury indicted him on May 16, 1980. He was arraigned before Justice Roberts on September 15, 1980.

By motion dated September 15, 1980, petitioner moved pro se to dismiss the indictment pursuant to C.P.L. § 190.50(5)(c)[5] on the ground that he was denied his right to appear before the grand jury. The State advised Justice Roberts that petitioner did not serve

written notice on the district attorney of his desire to appear before the grand jury. However, the State did not inform Justice Roberts that, in prior proceedings in Criminal Court, petitioner notified the State on the record that he wished to exercise his right to appear before the grand jury. The State also did not apprise the judge that the State itself had undertaken to make a written note of petitioner's request. Justice Roberts denied petitioner's motion to dismiss on April 16, 1981, and trial was scheduled.

Petitioner was convicted by a jury on July 22, 1981. A judgment of conviction was entered on October 1, 1981.[6]

Following his conviction, petitioner appealed pro se to the Appellate Division, First Department. Petitioner raised several grounds for reversal, including the fact that the indictment should have

been dismissed because the prosecution unconstitutionally ignored his request to appear before the grand jury. The State argued, inter alia, that petitioner's September 15, 1980 motion to dismiss the indictment had not been filed until October 17, 1980 and was therefore untimely. This, as acknowledged by the State in its memorandum in opposition to this petition, was incorrect; the motion was timely. The State also argued that petitioner's notice of his wish to testify before the grand jury was insufficient, as it was not in proper form.

The Appellate Division affirmed petitioner's conviction without opinion on January 12, 1984. People v. Saldana, 99 A.D.2d 686 (1st Dept. 1984). Leave to appeal to the Court of Appeals was denied on March 15, 1984. People v. Saldana, 62 N.Y.2d 623 (1984).

Petitioner contends that his federal constitutional rights were infringed by the State's denial of his opportunity to appear before the grand jury, a state-created right. He argues that the notice in this case was more than sufficient to preserve his right to testify before the grand jury. In the alternative, petitioner claims that if this notice did not meet the technical requirements of C.P.L. § 190.50, the application of those requirements to the facts of this case should render the statute unconstitutional as applied. He contends that the deprivation of his grand jury rights was not harmless error.

In opposition, the State argues that petitioner's right to appear before the grand jury is not cognizable under federal habeas review. The State further contends that there was no violation of New York

law because petitioner failed to give written notice to the district attorney pursuant to C.P.L. § 190.50. Finally, the State contends that even if there was a violation of New York law, the violation was harmless.

III.

Two issues are raised by the amended petition: (1) whether petitioner's federal constitutional rights to due process and equal protection were infringed by the denial of his right to appear and testify personally before the grand jury, and (2) whether the fact that petitioner's trial counsel did not retain or consult a ballistics expert deprived petitioner of the effective assistance of counsel.

Both issues were considered in my original decision denying habeas corpus relief on the merits in the context of petitioner's claim of ineffective assistance of counsel. The amended petition requires me to consider the grand jury issue in a different light; the claim with respect to the ballistics expert remains the same, nor does my disposition thereof.

IV.

A state is not required to create a right to testify before a grand jury. Indeed, there is no federal right with respect to state prosecutions even to be indicted by a grand jury, much less to appear before one. United States v. Thompson, 144 F.2d 604, 605-06 (2d Cir.), cert. denied, 323 U.S. 790 (1944); Ronson v. Commissioner, 551 F. Supp. 450, 458 (S.D.N.Y. 1972), aff'd, 742 F.2d 1446 (2d

Cir. 1984), cert. denied, 469 U.S. 841 (1984).

However, once a state has created a right, such as that of a defendant to appear before a grand jury, it cannot cause that right to be forfeited in a manner which is arbitrary or fundamentally unfair. See Evitts v. Lucey, 469 U.S. 387 (1985). In Evitts, the Supreme Court held that the Due Process Clause guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. In so holding, the Court ruled that while the Constitution "does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors . . . if a State has created appellate courts . . . the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of

the Constitution." Id. at 393.

In Evitts, the Commonwealth of Kentucky had argued that "whatever a state does or does not do on appeal -- whether or not to have an appeal and if so, how to operate it -- is of no due process concern to the Constitution . . ." Id. at 400. The Supreme Court disagreed:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. See Goldberg v. Kelly, 397 U.S. 254, 262 (1970). Similarly, a State has great discretion is setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. See Morrissey v. Brewer, 408 U.S. 471, 481-484 (1972). See also Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S.

> 535, 539 (1971); Sherbert v. Verner, 374 U.S. 398, 404 (1963); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 165-166 (1951) (Frankfurter, J., concurring). In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause.

469 U.S. at 400-01 (emphasis added).[7]

Since the State of New York has chosen to give a putative defendant the statutory right to appear before a grand jury, it must conform the conditioning of that right to the requirements of the Due Process Clause. Thus, the denial of petitioner's right to appear before the grand jury and the circumstances surrounding that denial must be analyzed in constitutional terms. Petitioner's grand jury claim is constitutionally cognizable, and the question as to whether the notice given was or was not sufficient

to preserve his right to appear before a grand jury must be constitutionally analyzed.[8]

V.

Notice of defendant's desire to testify before the grand jury was given in the following manner: (1) petitioner gave written notice to Judge Mogel of the criminal court; (2) Judge Mogel recorded the notice on official court records; (3) both Judge Mogel and petitioner gave oral notice on the record to the assistant district attorney; and (4) the assistant district attorney receiving the oral notice on the record undertook, on the record, to note defendant's request on the district attorney's files: "I'll also note that on the D.A.'s papers, Judge."

The plain language of the statute, C.P.L. § 190.50(5)(a), requires written notice to the District Attorney of a

defendant's desire to appear before a grand jury. Petitioner argues that written notice to the court and oral notice on the record by petitioner and by the court to the district attorney, acknowledged on the record by the district attorney, is sufficient notice.

Two recent New York state court decisions have liberally construed the written notice requirement. People v. Gini, 421 N.Y.S.2d 269 (2d Dept. 1979); People v. Kennedy, N.Y.L.J. Oct. 27, 1981, p. 12, col. 2 (Sup. Ct. 1981).

In Gini, the defense counsel orally informed the prosecutor that the defendant wished to appear before the grand jury, and then did so in writing. The written notice on the district attorney, however, was concededly received subsequent to the submission of the matter to the grand jury, and the return of an indictment by

the grand jury. The court held that the statutory requirement of written notice to the district attorney was not determinative: "Notwithstanding the oral notification, the prosecutor hastily submitted the case to the Grand Jury with an indictment being voted and filed on the next day . . ." Gini, 421 N.Y.S.2d at 270. The court held that the defendant was improperly denied his right to appear before the grand jury and pursuant to C.P.L. § 190.50(5)(c) dismissed the indictment.

In Kennedy, the defense counsel orally informed the district attorney on the record that the defendant desired to testify and appear before the grand jury, but did not give any written notice. The defendant was indicted five days later without having been afforded the opportunity to testify before the grand

jury. The court held that the oral notice to the district attorney on the record in criminal court was an acceptable surrogate for the statutorily required written notice:

> In the instant case, the defendant did not give written notice as provided by CPL 190.50(5a), but did notify the district attorney on the record in the Criminal Court that he desired to testify and appear before the grand jury. Under the circumstances, and in the interest of justice, the court finds that the defendant substantially complied with the provisions of CPL 190.50(5a).

Kennedy, N.Y.L.J. at p. 12, col. 2. The indictment was dismissed.

The notice in this case was certainly more than adequate to alert the district attorney that a request to testify before the grand jury had been made by petitioner. Not only did petitioner on the record orally notify both the criminal court judge and the assistant district

attorney of his desire, but the assistant district attorney himself represented on the record to the court and to petitioner that he would note the request on the district attorney's papers. This, at the very least, implied that the district attorney would have written notice of petitioner's request and could have led petitioner to believe that the written notice requirement was or would be satisfied. Moreover, petitioner was without counsel at the March 19, 1980 calendar call, and as such his compliance with the requirements of notification must be construed liberally, and measured by less stringent standards than if he had been represented by counsel. See Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983).

The State, in maintaining that New York courts literally construe the

requirement that written notice be given to the district attorney, relies on two cases that were decided under an earlier statute, Code of Criminal Procedure § 250.2, and not under C.P.L. § 190.50. See People v. Weis, 301 N.Y.S.2d 186 (3d Dept. 1969), cert. denied, 397 U.S. 1047 (1970); People v. Reynolds, 313 N.Y.S.2d 223 (2d Dept. 1970). Section 250.2 required notice not only to the district attorney, but also to the grand jury foreman.[9]

The decision in Weis lends little, if any, support to the district attorney's argument. The decision merely states that "[d]efendant's complaint that he was not permitted to testify before the Grand Jury is not well taken since he failed to file or serve the requests specified in subdivision 2 of section 250 of the Code of Criminal Procedure." Weis, 301 N.Y.S.2d

at 190 (citation omitted). There is no discussion in Weis as to whether or not the defendant gave any notice, either written or oral, to the district attorney.

In Reynolds, the defendant's counsel gave oral notice in open court to the district attorney of defendant's desire to appear before the grand jury, but defendant was not afforded an opportunity to appear. The Second Department, while refusing to dismiss the indictment because the defendant had not "serve[d] a formal request to appear and waive[d] immunity," 313 N.Y.S.2d at 224, noted its disapproval of the prosecutor's conduct:

> When defendant was arraigned in the Nassau County District Court, on the same day the homicide occurred (a Friday), the prosecutor requested and was granted an adjournment to the following Wednesday. At that same arraignment, defense counsel notified the prosecutor, in open court, that he intended to request an appearance by his

> client before the Grand Jury. Despite that notification, the prosecutor hastily submitted the case to the Grand Jury on the following Monday (only three days after the crime and preliminary arraignment), without notifying defense counsel that it was being presented. Such tactics do not comport with traditional concepts of fair play and should not by used by a prosecutor.

Id. at 225. There was no showing in Reynolds that the defendant provided any notice to the grand jury foreman.

Other cases either directly or indirectly support petitioner's position that, given all of the circumstances in this case, the notification sufficiently complied with the statute's requirements.

In People v. Leggio, 507 N.Y.S.2d 131, 133 (Sup. Ct. N.Y. Cty. 1986), defendant claimed that the grand jury proceeding was defective within the meaning of C.P.L. §§ 210.35 and 190.50(5) because he was denied the opportunity to

testify before the grand jury on his own behalf. The essence of his claim was that a letter he wrote to the Special Narcotics Prosecutor indicated that he had reserved his right to testify in the grand jury, and that this request was ignored. The court rejected defendant's argument, ruling that "[a] request to testify before the grand jury must be specific and unequivocal before the Court can entertain a motion to dismiss the indictment pursuant to CPL 190.50(5)(a)." Id. at 132. In so holding, the court identified the issue in the case as whether a "proper request evincing [defendant's] desire to testify before the grand jury was ever made." Id. at 133. It noted that the defendant's letter only stated that he "reserved" the right to testify:

> That communication merely reiterates a right which the legislature created for any

> defendant in Leggio's position. I hold that in order to effectuate that right, the defendant must activate it in an affirmative manner by making an unqualified, specific request to come before the grand jury and testify. It is only then that defendant's right to testify accrues. . . . "Reserving" one's right to testify, as Leggio did, and "requesting" to appear before the grand jury, as the statute requires, are not synonymous. Since defendant's letter did not constitute a request to testify within the meaning of the statute, the prosecutor had no obligation to notify Leggio to appear before the grand jury.

Id. at 133 (emphasis added). Applying the standard set forth in Leggio, it is clear that Saldana "activated" his right to appear "in an affirmative manner by making an unqualified, specific request to come before the grand jury and testify," even if his notification to the assistant district attorney did not strictly comply with the statute.

In People v. Phillips, 450 N.Y.S.2d 925 (3d Dept. 1982), the Third Department addressed the notice that the district attorney must provide to a defendant who has been "arraigned in a local criminal court upon a currently undisposed felony complaint dealing with the subject matter that grand jury proceedings are to commence." Id. at 926. The record in Phillips demonstrated that oral notice to defendant's attorney was given a week in advance of the scheduled date of presentment. The Third Department ruled that this "oral notice sufficiently complied with the People's statutory obligation under [C.P.L. § 190.50(5)]." Id. (citations omitted). If, as the Third Department suggests, oral notice is sufficient compliance by the district attorney, then it is at least arguable that oral notice on the record and in open

court would also constitute substantial compliance by the defendant.[10]

In sum, a district attorney "is under a duty to act consistently in good faith when dealing with a defendant's right to appear and testify before a Grand Jury." People v. Martinez, 443 N.Y.S.2d 576, 578 (Sup. Ct. Queens Cty. 1981). Petitioner was assured that his request to testify would be put in writing and he justifiably assumed that no further action was required to satisfy the notice requirement. Taking this fact and the numerous oral notices given to the State into account, as well as the relevant New York decisions, I find that petitioner's notice was sufficient[11] to preserve his right to testify before the grand jury, and that the Due Process Clause was violated by not allowing petitioner to testify.[12]

VI.

I next consider whether the denial of petitioner's right to appear before the grand jury constituted harmless error.[13]

Before a federal constitutional error can be held harmless, the court must be able to conclude that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Moreover, a constitutional error "casts on someone other than the person prejudiced by it a burden to show that it was harmless." Id.; Hawkins v. Lefevre, 758 F.2d 866, 877 (2d Cir. 1985). The burden thus rests on the State to establish that the error was harmless.[14] The error must be analyzed as to its effect on "the validity of the underlying judgment [or as to its effect on] the integrity of the process by which that judgment was obtained." Hawkins, 758 F.2d at 878. See also U.S.

v. Bueno-Risquet, 799 F.2d 804, 812 (2d Cir. 1986).

Since petitioner's right to appear before a grand jury is state-created and the finding of constitutional error is predicated on the State's failure to afford petitioner procedural due process, I initially look to New York law to determine whether the deprivation of petitioner's right was harmless.

Under New York law a violation of a defendant's right to testify before the grand jury can never be harmless.[15] This proposition is supported by two provisions of New York criminal procedure law: 1) this type of error in grand jury proceedings renders the indictment automatically defective pursuant to C.P.L. § 210.35;[16] and 2) this type of error necessitates the automatic dismissal of a defectively secured indictment under

C.P.L. § 190.50(5)(c).[17] Moreover, under New York case law, a subsequent conviction will not cure the deprivation of grand jury rights arising under C.P.L. § 190.50. People v. Durante, 469 N.Y.S.2d (2d Dept. 1983); People v. Gini, 421 N.Y.S.2d 269 (2d Dept. 1979). Under New York law, the denial of petitioner's right to appear before the grand jury was not harmless.

Even if New York law is not controlling, the State has not met its burden of proving the error harmless beyond a reasonable doubt. The State emphasizes that petitioner declined the opportunity to appear before the petit jury which convicted him, arguing that it is "simply impossible to believe that he would have declined the opportunity to testify if he had anything 'crucial' to say in his defense." The State also notes that petitioner does not identify any "crucial"

evidence of which he was deprived. In addition, the State argues that petitioner attempts to relitigate the theory pressed at trial that someone else actually shot the police officer. The petit jury was presented with precisely these arguments and rejected them, from which the State concludes that petitioner's guilt had been established under the beyond-a-reasonable-doubt standard. Finally, since petitioner could have been impeached with his criminal record before the grand jury, and the threat of such impeachment was admittedly the reason for petitioner's unwillingness to testify before the petit jury, the State finds petitioner's position wholly untenable.

The State's arguments are without merit. First, petitioner argues that had he been afforded the opportunity to testify before the grand jury, the grand

jury might not have indicted him at all, or more likely might have chosen to indict him on lesser charges. This type of argument finds support in a recent Supreme Court decision:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense -- all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." United States v. Ciambrone, 601 F.2d 616, 629 (CA2 1979) (Friendly, J., dissenting). Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.

Vasquez v. Hillery, 474 U.S. 254, ___, 106 S. Ct. 617, 623 (1986). While the Vasquez decision was expressly limited to the problem of racial discrimination by the Supreme Court's later decision in United States v. Mechanik, 475 U.S. 66, ___ n.1, 106 S. Ct. 938, 942 n.1 (1986), its underlying rationale applies to the case sub judice.

In addition, the fact that petitioner did not testify before the petit jury cannot form the basis of any adverse inference regarding the substance of his testimony, for this would violate his Fifth Amendment rights. See Griffin v. California, 380 U.S. 609, 614 (1965) (comment by court or prosecutor regarding accused's refusal to testify at trial outlawed by Fifth Amendment because it is a penalty imposed for exercising constitutional privilege). Thus the State's argu-

ment that petitioner has not come forward with "crucial" evidence is unpersuasive. Additionally, under New York State law the disclosure of petitioner's proposed grand jury testimony "is not required either by statute or case law." People v. Jones, 481 N.Y.S.2d 594, 596 (Sup. Ct. Kings Cty. 1984). Moreover, while it is true that petitioner could have been impeached at the grand jury level, he would not have waived his right to remain silent at trial where his innocence is adjudicated with finality. United States v. Miranti, 253 F.2d 135, 139 n.3 (2d Cir. 1958); McCormick, Evidence § 132 (1972).

The reliance by the State on the Supreme Court's recent decision in United States v. Mechanik, 475 U.S. 66, 106 S. Ct. 938 (1986) is misplaced. Because of the decision's complex procedural background, I examine it in detail.

In Mechanik, a federal grand jury returned an indictment charging defendants with drug-related offenses and conspiracy. The indictment was concededly free from any claim of error. A superseding indictment was subsequently returned in which the conspiracy charge was expanded. In support of the superseding indictment, the government presented the testimony of two law enforcement agents who were sworn together and questioned in tandem before the grand jury. Defendants did not learn about this joint testimony until after trial began, and then moved for dismissal of the indictment on the grounds, inter alia, that this simultaneous presence of the two agents had violated F.R.Crim.P. 6(d).[18] The motion was denied initially by the judge presiding over the trial, and then denied again on reconsideration by a second judge after the jury had returned a

guilty verdict; the first trial judge had been hospitalized. The second judge ruled that while Rule 6(d) had been violated, the violation had not harmed the defendants.

A divided Fourth Circuit reversed the conspiracy convictions, affirmed the others, and dismissed the conspiracy portion of the indictment, finding that the violation of Rule 6(d) tainted only that portion of the superseding indictment that related to the conspiracy convictions. A divided en banc decision agreed. See 106 S. Ct. at 940-41.

The Supreme Court reversed to the extent that the judgment of the Court of Appeals set aside the conspiracy convictions and dismissed the indictment, and otherwise affirmed. Justice Rehnquist writing for a majority of the Court assumed initially that there was a violation

of Rule 6(d), but found it harmless as a matter of law:

> The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

106 S. Ct. at 942-43 (emphasis added).

The Mechanik Court gave short shrift to the argument asserted by the defendants that the indictment should not be compared to the evidence produced by the Government at trial. This argument formed the basis for Justice O'Connor's concurring opinion, in which Justices Brennan and Blackmun

joined. She wrote separately because she believed that "the analysis adopted by the Court for determining the effect of a violation of the rules governing the conduct of grand juries effectively renders those rules a dead letter, thereby seriously undermining the grand jury's traditional function of protecting the innocent from unwarranted public accusation." 106 S. Ct. at 943. Because a Rule 6(d) violation affects the grand jury proceeding and is not a trial error, Justice O'Connor argued that "the logical focus of the harmless error inquiry is an examination of the influence of the error on the charging decision." Id. at 944.

While Mechanik at first glance seems on point, it is actually inapposite.

First, the trial court in Mechanik, unlike the trial court in this case, was not informed of the grand jury irregu-

larity until the middle of the trial. Secondly, the specific issue presented here, the appropriate standard to apply when the grand jury error was brought to the trial court's attention before trial, was expressly reserved by the court in Mechanik. 106 S. Ct. at 943. Additionally, the Supreme Court decided Mechanik under Federal Rule of Criminal Procedure 6(d), which is a provision designed to insure "that grand jurors sitting without direct supervision of a judge, are not subject to undue influence." Id. at 941. The prejudice entailed in having two witnesses appear together before the grand jury is that the charging jury may be subjected to such undue influence: no statutory consequence attends a violation of Rule 6(d). The purpose of C.P.L. § 190.50(5)(a), on the other hand, is to afford a defendant the right to testify

before the grand jury, and to give him an opportunity, through that testimony, to attempt to reduce the scope of the charge which may be returned, or even to deflect the charge entirely. The denial of this right cannot be cured at trial, and there is no way the State can establish that the denial of the right was harmless beyond a reasonable doubt, since the consequences of petitioner's aborted appearance before the grand jury will never be known. It is undoubtedly for this reason that New York law provides for automatic dismissal of an indictment when the statutory right to appear before the grand jury has been denied to a defendant. N.Y.C.P.L. § 210.35, subpar. 4.

VII.

Petitioner's claim is federally cognizable. The notice he gave was sufficient to preserve his right to

testify before the grand jury, the deprivation of which was not harmless.

Petitioner's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) is granted. His petition for a writ of habeas corpus is granted. The indictment is set aside, as is the conviction which was based thereon. If the matter is submitted to another grand jury, the defendant must be given an opportunity to testify before it.

SO ORDERED.

VINCENT L. BRODERICK, U.S.D.J.

Dated: New York, New York
July 10, 1987

Footnotes

1 In the petition, Saldana presented four grounds for relief. They were: (1) the prosecution failed to provide petitioner with exculpatory evidence; (2) ineffective assistance of counsel due to counsel's absence from a calendar call, and the alleged failure to hire a ballistics expert; (3) denial of petitioner's right to argue his appeal orally; and (4) denial of due process and a fair trial by the trial court improperly amending a stipulation the parties had agreed to, and through improper comments by the prosecutor during opening statements and summations.

In denying the petition, I ruled inter alia that petitioner did not meet his burden of proving ineffective assistance of counsel with respect to his counsel's failure to preserve the petitioner's right to appear personally before the grand jury and with respect to his counsel's failure to retain a ballistics expert.

2 By order of the Second Circuit dated May 20, 1986, the firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer") was appointed to represent petitioner. Kaye Scholer, by Steven Glickstein, Esq., has now moved to be appointed counsel for petitioner in this court pursuant to 18 U.S.C. § 3006A. That motion is granted.

3 N.Y.C.P.L. § 190.50(5)(a) provides:

Footnotes

(Footnote 3 continued from previous page)

5. Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under circumstances prescribed in this subdivision:

(a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent. The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging

Footnotes

(Footnote 3 continued from previous page) an offense which is a subject of the prospective or pending grand jury proceeding. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein.

4 Judge Mogel used the Greek letter delta rather than "D" to represent "defendant."

5 N.Y.C.P.L. § 190.50(5)(c) provides:

> (c) Any indictment or direction to file a prosecutor's information obtained or filed in violation of the provisions of paragraph (a) or (b) is invalid and, upon a motion made pursuant to section 170.50 or section 210.20, must be dismissed; provided that a motion based upon such ground must be made not more than five days after the defendant has been arraigned upon the indictment or, as the case may be, upon the prosecutor's information resulting from the grand jury's di-

Footnotes

(Footnote 5 continued from previous page)
rection to file the same. If the contention is not so asserted in timely fashion, it is waived and the indictment or prosecutor's information may not thereafter be challenged on such ground.

6 Petitioner was sentenced as a predicate felon to concurrent terms of from twenty-five years to life on an attempted murder count, seven and one-half to fifteen years on assault and weapons counts, and one year on a stolen property count. This sentence was to be consecutive to a federal sentence petitioner is serving.

7 See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982) (while legislature may elect not to confer property interest it may not constitutionally authorize deprivation of such an interest, once conferred, without appropriate procedural safeguards, which must be analyzed in constitutional terms); Goss v. Lopez, 419 U.S. 565, 574 (1975) (having chosen to extend right of education to people of appellee's class, state may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether misconduct has occurred); Wolff v. McDonnell, 418 U.S. 539, 557 (1974) (state granted entitlement to time off for good behavior cannot be arbitrarily abrogated); Cleveland

Footnotes

(Footnote 7 continued from previous page) Board of Education v. Loudermill, 470 U.S. 532, 541-42 (1985) (state-created property interest in public employment may not be constitutionally abrogated without appropriate procedural safeguards).

8 The State asserts that a state court's interpretation of state law, even if arguably erroneous, is not a proper subject for federal habeas corpus review. Pulley v. Harris, 465 U.S. 37, 41 (1984); Wainwright v. Goode, 464 U.S. 78, 83-84 (1983). However, these cases stand for the proposition that (1) federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension, and (2) the views of a state's highest court with respect to state laws are binding on the federal courts. It is implicit in these cases that federal courts may intervene in a proper case to correct arbitrary deprivations of state-created rights. Indeed, the Supreme Court in Wainwright stated that "mere errors of state law are not the concern of this Court . . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." 464 U.S. at 86, citing Barclay v. Florida, 463 U.S. 939, 957-58 (1983); Gryger v. Burke, 334 U.S. 728, 731 (1948).

The State also argues that the alleged failure to allow petitioner

Footnotes

(Footnote 8 continued from previous page) to appear before the grand jury is not federally cognizable because "failure to follow state procedure . . . is not a ground for federal habeas corpus relief." Quiroz v. Wawrzaszek, 749 F.2d 1375, 1377 (9th Cir. 1984), cert. den., 471 U.S. 1055 (1985) citing Guzman v. Morris, 644 F.2d 1295 (9th Cir. 1981). The Ninth Circuit in Quiroz, however, then proceeded to consider whether due process was violated. Thus it did not end its inquiry at the state procedural level but rather looked to see if the Due Process Clause was violated, as I must do in the case before me.

9 Section 250.2 of the Code of Criminal Procedure provides:

> When any person has reason to believe that a grand jury is investigating a charge that he has committed a crime, such person, may as a matter of right, voluntarily file with the foreman of the grand jury and with the district attorney of the county, a request that he be heard in person before such grand jury with reference to such charge; such request shall be personally served on both the foreman of the grand jury and on the district

Footnotes

(Footnote 9 continued from previous page)
attorney.

10 In People v. Ali, 498 N.Y.S.2d 264 (Sup. Ct. West Cty. 1986), defendant conceded that he did not provide written notice under C.P.L. § 190.50(5)(a). The court then noted that "the People represent that they never received any oral notice from the defendant, or his former counsel, requesting the opportunity to testify at the grand jury." Id. at 264-65. Implicit in the court's analysis may be the recognition that oral notice constitutes at least some compliance with the statute.

11 Since I believe that petitioner's notice was sufficient, I shall not address petitioner's argument as to the constitutionality of C.P.L. § 190.50(5)(a).

Similarly, I shall not separately address petitioner's argument that he was denied effective assistance of counsel with respect to his grand jury rights. Since the argument was raised by petitioner in the alternative and I have found that the notice was sufficient, it is unnecessary in deciding this application. In any event, by my memorandum order dated October 11, 1985 I have already rejected this argument.

12 One troubling aspect in resolving this question is the Appellate Division's affirmance without opinion

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(Footnote 12 continued from previous page) of petitioner's conviction. Because the Appellate Division did not render an opinion, it is unclear if it considered the issue of whether petitioner's repeated oral notices substantially complied with the provisions of N.Y.C.P.L. § 190.50(5)(a).

13 Petitioner suggests in a footnote that a harmless error analysis may not apply here. He relies on two Supreme Court decisions in which criminal defendants alleged that deprivation of their state-created right to appeal was unconstitutional, and where no harmless error analysis was invoked. Evitts v. Lucey, 469 U.S. 387 (1985); Griffin v. Illinois, 351 U.S. 12 (1956).

14 The fact that the burden rests on the state and not on the petitioner distinguishes this harmless error analysis from the prejudice requirement in petitioner's original claim of ineffective assistance of counsel. See October 11, 1985 Memorandum Order at 6-7. In the original claim, the burden was on petitioner and he did not satisfy it.

15 Under the New York Constitution, Article I, Section 6, a person has the right to be tried only upon a valid indictment. The New York Constitution, Article I, Section 6 reads:

No person shall be held to

Footnotes

(Footnote 15 continued from previous page)

answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel.

16 N.Y.C.P.L. § 210.35 reads as follows:

A grand jury proceeding is defective within the meaning of paragraph (c) of subdivision one of section

Footnotes

(Footnote 16 continued from previous page)

210.20 when:

1. The grand jury was illegally constituted; or

2. The proceeding is conducted before fewer than sixteen grand jurors; or

3. Fewer than twelve grand jurors concur in the finding of the indictment; or

4. The defendant is not accorded an opportunity to appear and testify before the grand jury in accordance with the provisions of section 190.50; or

5. The proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result.

Under subparagraphs 1 through 4 of § 210.35 the grand jury proceeding is by operation of law defective when the situation provided against occurs. It is only under subparagraph 5 that one considers the degree of harm in determining whether the proceeding is defective.

Footnotes

17 See footnote 5, supra.

18 F.R.Crim.P. 6(d) provides:

> (d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Copies have been mailed to:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOSE SALDANA, :

Petitioner, : 84 Civ. 5254 (VLB)

- against - : MEMORANDUM ORDER

STATE OF NEW YORK, :

Respondent. :

----------x

VINCENT L. BRODERICK, U.S.D.J.

By memorandum order dated January 31, 1985, I dismissed petitioner's application for a writ of habeas corpus for failure to exhaust state court remedies with respect to one of the claims presented, and I found that an additional claim was frivolous. Familiarity with that memorandum order is assumed for the purposes of this order.

By application on its face dated January 7th, 1985[1] petitioner filed a "Request for a Re-Hearing or in the

Alternative, Request For a Certificate of Probable Cause." Petitioner attached several documents to this request, including (1) a copy of his "Motion for Certificate Granting Leave to Appeal," which was dated April 26, 1983, and presumably filed in the New York Court of Appeals sometime thereafter; and (2) a copy of a "Certificate Dismissing Application" signed by the Honorable Sol Wachtler, then an associate judge of the New York Court of Appeals, dismissing petitioner's appeal on the ground that the order from which petitioner sought to appeal was not appealable. Neither of these documents had previously been provided to me by respondent. After receiving petitioner's application for re-hearing I ordered a further response from respondent on the merits.

Petitioner's application for a rehearing is granted.

For the reasons set forth in this memorandum order, the petition for a writ of habeas corpus is denied.

I.

Petitioner has exhausted state judicial remedies as to all claims save that of his asserted right orally to have argued his appeal. The question of whether or not petitioner's state court remedies have been exhausted as to that claim is a troublesome one. Federal constitutional predicates for the claim were apparently not presented in the original pro se application to the Appellate Division to argue the appeal orally, but the "Motion for Certificate Granting Leave to Appeal" thereafter addressed to the New York Court of Appeals seems to have invoked constitutional

predicates. The Court of Appeals denied petitioner's claim, however, on the ground that it was not appealable. Thus, the Court of Appeals may not have addressed the claim on the merits.

My original determination that petitioner had not exhausted his state remedies was made upon an incomplete record, since respondent failed to make available to me the "Motion for Certificate Granting Leave to Appeal" and the "Certificate Dismissing Application," supra. What other parts of the record respondent may still have failed to disclose I do not know. I do not intend to speculate. Given respondent's performance to date, however, I would be loathe indeed to decide the exhaustion issue on the record presently before me. The obvious purpose of the rule of Rose v. Lundy, 455 U.S. 509 (1982) is to minimize

premature recourse to the federal courts: when the respondent in a case such as this exercises inappropriate discretion in determining what is to be made available to the habeas court a rigid application of Rose v. Lundy may result in the proliferation of unnecessary litigation.

The Supreme Court recognized in Strickland v. Washington, 104 S. Ct. 2052 (1984), that the exhaustion rule "though to be strictly enforced, is not jurisdictional." Id. at 2063. The procedural background of this case mandates, in my view, that I address this petition on the merits.

II.

Petitioner's federal constitutional rights were not violated when the Appellate Division denied his application to argue his appeal orally. While the Supreme Court has held that a defendant is

constitutionally entitled to present his own defense, see Faretta v. California, 422 U.S. 806 (1975), such rights do not extend to the right to argue his own appeal. See, e.g., Price v. Johnson, 334 U.S. 266, 285 (1948); Schwab v. Berggren, 143 U.S. 442, 448-49 (1892).[2] So long as "reasonable necessity so dictates," Price, 334 U.S. at 286, a state may deny an application by a convicted defendant to argue his own appeal. Furthermore, an appeal does not constitute "an essential ingredient of due process." Price, 334 U.S. at 286.

The circumstances present in the instant case certainly provide justification for the state's denial of petitioner's application. Petitioner was convicted of serious crimes and apparently was incarcerated on federal convictions at the time of his appeal.[3] State appellate

courts are not equipped to handle incarcerated prisoners and the state is not required to provide such facilities. Petitioner was afforded the opportunity to have appellate counsel appointed but he chose to exercise his right to appeal pro se. The state did not deny petitioner his right to file appellate papers pro se and petitioner filed a comprehensive brief with the Appellate Division. This brief certainly brought those issues petitioner considered relevant to the attention of that court. That is all that the federal constitution requires.

III.

Petitioner's claim that he was denied effective assistance of counsel also lacks merit. In order to establish such a claim, petitioner must show 1) that he was denied the reasonably effective assistance of counsel and 2) that he was prejudiced

by the ineffectiveness of the defense rendered. Strickland v. Washington, 104 S. Ct. 2052 (1984). In establishing a claim for ineffective assistance of counsel petitioner must affirmatively prove that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S. Ct. at 2068.

Petitioner points to two "omissions" by his trial counsel in arguing that he was rendered ineffective assistance of counsel.

The first "omission" petitioner alleges concerns the absence of his attorney at a pre-trial calendar call on March 19, 1980. Petitioner alleges that the absence of his attorney at this calendar call prevented him from exercising properly his statutory right to appear personal-

ly before the grand jury which was going to consider the evidence in his case.

In substance, petitioner's position is that he requested the right to appear before the grand jury which ultimately indicated him; that his request was made a matter of record; that under state law he had an absolute right to appear before the grand jury, once the request was made; that his attorney, who was absent when the request was made, knew or should have known of the request; that the grand jury proceeded to return an indictment without affording petitioner an opportunity to be heard; and that his attorney neither renewed the request that he be permitted to appear before the grand jury, nor took appropriate corrective action when petitioner was indicted by a grand jury before which petitioner had not appeared.

A target of a grand jury investigation has no federal constitutional right to appear before a grand jury. See United States v. Thompson, 144 F.2d 604, 606 (2d Cir.), cert. denied, 323 U.S. 790 (1944); United States v. Pabian, 704 F.2d 1533, 1538-39 (11th Cir. 1983); United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 648 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Elksnis, 259 F. Supp. 236, 237 (S.D.N.Y. 1966), cert. denied, 390 U.S. 990 (1968); United States v. Rosen, 259 F. Supp. 942, 944 (S.D.N.Y. 1966). While the failure to provide a target the opportunity to testify on his own behalf may create the appearance of inequity, see United States v. Pabian, 704 F.2d at 1539, it does not amount to a federal constitutional violation. See United States v. Thompson, 144 F.2d at 605-06. It logically follows

that petitioner was not constitutionally prejudiced by the failure of his attorney to request an opportunity for petitioner to appear before the grand jury.

I have also considered whether this aspect of the allegedly "ineffective assistance" by petitioner's counsel implicated federal due process rights. Irrespective of the fact that the target of a grand jury investigation has no constitutional right to appear before the grand jury, petitioner might argue that since state law afforded him the right, upon request, to appear before the grand jury which investigated him, and he had made the requisite request (albeit perhaps not in the precise format prescribed by state law), his attorney's failure to pursue the matter resulted in petitioner being denied due process. Here I deem it appropriate to defer to the judgment of

the state appellate courts, which are bound to apply the same federal constitutional principles as am I, and which are perhaps in a better position than am I to determine whether the failure to comply with a request by a target to appear before a grand jury has federal due process implications.

At any rate, even if it constituted ineffective assistance of counsel for petitioner's attorney to have failed to file the formal request for petitioner to appear before the grand jury, petitioner was not prejudiced to the extent that "the result of the proceeding would have been different." Strickland, 104 S. Ct. at 2068.[4] Thus, no showing has been made that petitioner would have provided any information to the grand jury that might have persuaded the grand jury not to indict him. In fact, the evidence was

overwhelming as to petitioner's guilt. The burden on the state before the grand jury had been simply to persuade it that there was probable cause to believe, on the basis of the uncontroverted testimony submitted to it, that petitioner had committed the crimes with which he was charged in the indictment. Bearing in mind that a petit jury before whom petitioner was tried thereafter found petitioner guilty beyond a reasonable doubt, it is unlikely that anything petitioner might have said to the grand jury would have dissuaded it from returning the indictment.

As a second "omission," petitioner claims that his attorney's failure to hire a ballistics expert to explore potential ballistics inconsistencies constituted ineffective assistance of counsel.

Petitioner maintains that there was a discrepancy between the testimony of respondent's ballistics expert and material produced to the defense pursuant to Brady v. Maryland, 373 U.S. 83 (1963); and that an independent ballistics expert might have materially assisted the defense.

The pentinent material produced to the defense on the ballistics question was a report containing the following:

> 4 - .357 Mag., SW, Rev., (6X6), Ser. #S157365, Blue Finish, Wood Handle
> Load 1 - (3) .357 Mag. SW, wp, disch. shells
> Evidence of Discharge - 3 Chambers
>
> ABOVE FIREARM WAS RECOVERED ON THE STREET NEXT TO THE LEFT FRONT WHEEL OF THE VEHICLE BY THE UNDERSIGNED OFFICER.

Officer Lofaro, who filed the report, testified at trial as follows:

> THE COURT: Three discharged shells, in the chamber?

THE WITNESS: Yes, there were.

MR. WALLACH: [co-defendant's attorney] In the chamber, your Honor, in the chamber.

I am going to object to the admissibility.

If your Honor wants an explanation, I will be glad to give it.

THE COURT: Overruled.

MR. WALLACH: Okay.

THE COURT: The three discharged shells, will be marked 34A.

Were the other chambers empty?

THE WITNESS: Yes, sir.

THE COURT: What do these three discharged shells indicate to you?

THE WITNESS: The three discharged shells 357 Magnum discharged shells.

THE COURT: You examined the gun to see if it had been recently discharged?

THE WITNESS: Yes, I did.

THE COURT: What did you find?

THE WITNESS: Showed evidence of recent discharge in three chambers.

THE COURT: Where the three discharged shells were found?

THE WITNESS: No, sir.

MR. WALLACH: I'm sorry, I didn't hear.

THE COURT: Evidence of recent discharge where?

THE WITNESS: In the three chambers.

THE COURT: In the empty chambers?

THE WITNESS: Yes.

THE COURT: And you found three discharged shells and three in the chambers and evidence of recent discharge in the other three empty chambers?

THE WITNESS: That's correct.

Tr. at 959-61.

The failure to put a ballistics expert on the stand did not constitute ineffective assistance of counsel. Petitioner has offered no suggestion as to how the testimony of an independent

ballistics expert might have helped his defense. The strategic decisions of trial counsel with respect to how to conduct a trial are best left undisturbed unless the test set forth supra from Strickland v. Washington, 104 S. Ct. 2052, has been met.

The Second Circuit has repeatedly stated that it is "reluctan[t] to second-guess matters of trial strategy simply because the chosen strategy was not successful." Trapnell v. United States, 725 F.2d 149, 155 (2d Cir. 1983); United States v. Helgesen, 669 F.2d 69, 72 (2d Cir.), cert. denied, 456 U.S. 929 (1982); United States v. Aulet, 618 F.2d 182, 189 (2d Cir. 1980). In this case, petitioner's counsel conferred with counsel for petitioner's co-defendant, and determined that a ballistics expert would not assist in the defense of the charges. That this occurred is confirmed by a letter to

petitioner from the Honorable Burton B. Roberts, the trial judge. This letter states, in pertinent part:

> My Law Secretary has spoken to your attorney, Mr. Ronald Aiges, who informed him that he conferred during the trial with Mr. Arnold Wallach, who was the attorney for your co-defendant, Mr. Latine and was informed by Mr. Wallach that he had called a ballistics expert regarding possible defense testimony at the trial. Mr. Wallach informed Mr. Aiges that the ballistics expert had indicated that any testimony he could give after he conducted the examination would not be helpful to the defense. As a result the ballistics expert was not called by Mr. Wallach or by your attorney. I am unaware, as is Mr. Aiges, if any written report was sent to Mr. Wallach by this ballistics expert. If there is such a report, it would be in Mr. Wallach's file.

In light of the foregoing, and also in light of petitioner's failure to point to anything of substance to indicate that the respondent has (or had at the time of trial) any additional information which

would tend to exculpate petitioner, see infra, Section III, I find that respondent's attorney did not render ineffective assistance of counsel by not hiring a ballistics expert to explain ballistics "inconsistencies" in the record.

Petitioner's attorney made a strategic choice, after what was apparently a reasonable investigation, not to hire a ballistics expert. Petitioner has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 104 S. Ct. at 2066 (quoting Michel v. New York, 350 U.S. 91, 101 (1955).[5]

III.

Petitioner's claim that respondent denied him exculpatory ballistics material, pursuant to Brady v. Maryland,

373 U.S. 83 (1963), is without merit. The United States Supreme Court has recently held that in order for a defendant to establish that the prosecutor violated his constitutional rights pursuant to Brady by withholding evidence, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 53 U.S.L.W. 5084, 5088 (U.S. July 2, 1985). This same standard applies if the defendant 1) did not make any request for exculpatory information or 2) made a general request for exculpatory information or 3) made a specific request for exculpatory information. In evaluating a claim that the government violated a defendant's rights pursuant to Brady,

> [t]he reviewing court should assess the possibility that [the nondisclosure had an adverse effect on the defendant's preparation or presentation of his case] in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

Id.

There are several separate and distinct reasons why petitioner's Brady claim is without merit. Petitioner has pointed to nothing concrete which even begins to help him establish that the respondent suppressed exculpatory material. Petitioner merely points to the "ballistics inconsistency" noted supra as support for his proposition that the respondent withheld favorable material. More than mere speculation that such evidence may exist is required. See,

e.g., United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982) ("the defendant must . . . prove that the Government, in fact, suppressed the evidence in question, and that this evidence was material"), cert. denied, 459 U.S. 1174 (1983); United States v. Luis-Gonzalez, 719 F.2d 1539, 1548 (11th Cir. 1983).

Second, petitioner did not object at the time Officer Lofaro testified, at which time he was put on notice that there might be additional ballistics information not previously made available to the defense. Had the petitioner made such an objection, the trial court could have granted a continuance, allowed Officer Lofaro to be recalled for additional examination, or petitioner could have introduced rebuttal evidence on this question. See United States v. Mourad, 729 F.2d 195, 199 (2d Cir.), cert. denied,

105 S. Ct. 180 (1984), 105 S. Ct. 2700 (1985). Thus, in this instance, petitioner was aware of any possible nondisclosure at the time of trial, and should have alerted the trial court at the time of Officer Lofaro's testimony that there was a problem. Objection by co-defendant's counsel, at page 960 of the transcript (see supra), was not at all sufficient to alert the court to a possible problem with respect to disclosure. Therefore, petitioner's claim is also barred by Wainwright v. Sykes, 433 U.S. 72 (1977).

Finally, petitioner's claim does not meet the materiality standard as enunciated by the Supreme Court in United States v. Bagley, supra. There were several independent pieces of evidence presented from which the jury could have inferred that petitioner possessed and

used a loaded firearm to commit the offenses with which he was charged. Thus, even if petitioner identified concrete evidence which had not been disclosed, and if this claim was not barred by Wainwright v. Sykes, I would still be precluded from granting petitioner the relief he requests because of his failure to establish that evidence was not disclosed which was material.

IV.

Petitioner's final claim is that he was denied a fair trial by judicial and prosecutorial misconduct. In my January 31, 1985 memorandum order I rejected petitioner's claims of judicial misconduct as frivolous. Nothing petitioner has presented on this motion for reargument persuades me otherwise.

With respect to petitioner's claims of prosecutorial misconduct, petitioner

failed, in all instances but one, to lodge contemporaneous objections to those remarks he considers prejudicial. The one remark which is not barred by Wainwright v. Sykes from habeas corpus review is respondent's characterization of the defense case as the "standard frame defense." Tr. at 2171. Petitioner's attorney objected to the prosecutor's comments in that wise, and there is nothing in the record to reflect the court's ruling on petitioner's objection. Although I believe that this comment by the prosecutor was a proper response to the characterization by defense counsel of the state's case, I find that even if I were to characterize this statement as objectionable, it did not so infect the trial as to make the resulting conviction a violation of petitioner's due process

rights. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1973).

The same result would obtain even if petitioner had preserved his objections to the other prosecutorial comments which he considers prejudicial. After considering the entire transcript of the trial, I find that even if all of the comments petitioner objects to were in point of fact objectionable, they did not so infect the trial as to deny petitioner due process.

V.

In light of my finding that all of petitioner's claims lack merit, I decline to appoint counsel for petitioner.

SO ORDERED.

VINCENT L. BRODERICK, U.S.D.J.

Dated: New York, New York
October 11, 1985

Footnotes

1 The actual date of this application must have been February 7, 1985 -- the memorandum order with respect to which petitioner seeks re-hearing was not signed and sent to the parties until January 31, 1985.

2 The relevant issue before the Supreme Court in Price was whether a federal circuit court of appeals had the power to issue a writ of habeas corpus to bring a prisoner before it so the prisoner could argue his own appeal. The Supreme Court ruled that the court had such power pursuant to 28 U.S.C. § 262 (the predecessor section to 28 U.S.C. § 1651), but also ruled that the exercise of such power was wholly within the discretion of the court. In my view, the same analysis is applicable to the instant case.

3 At the time of his trial, petitioner was serving an eighteen year sentence imposed by Judge Gerald L. Goettel of this court. Judge Goettel imposed this sentence on October 18, 1980, after petitioner was convicted of bank robbery. All of petitioner's correspondence with this court and with the state courts have been postmarked from federal penitentiaries around the country, indicating that petitioner is still serving his federal sentence. Further, petitioner informed the Appellate Division, First Department that he was a "federal prisoner" in his Motion for Oral Argument dated April

Footnotes

(Footnote 3 continued from previous page)
4, 1983.

4 It is entirely possible, of course, that petitioner's counsel exercised an informed discretion in not following up on petitioner's request to be permitted to appear before the grand jury, in the belief that such an appearance, in the context of this case, would have untoward consequences.

5 Even if I were to find that this "omission" by petitioner's counsel constituted ineffective assistance of counsel, petitioner has not overcome the "prejudice hurdle" established by Strickland. Therein, the Supreme Court stated that "[i]n making [a prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Strickland, 104 S. Ct. at 2069. In this case, the evidence was substantial that petitioner possessed and used a loaded .357 Magnum during the incidents in question. Officer Monteleone testified that he saw a "male crouched in the [back] seat -- behind the seat on the floor well behind the driver's seat and also at some poin[t] in the car I could see there was a handgun. I can't say whose hand it was in." Tr. at 577-78. Other testimony in the case placed petitioner in the back seat of the Malibu.

Footnotes

(Footnote 5 continued from previous page)

Donnell Brown testified that petitioner told him he threatened Latine with petitioner's .357 Magnum if Latine did not shoot the police with the shotgun. Tr. at 1604. Petitioner also told Brown he left his gun at the car because he did not want to be caught with it. The .357 Magnum, which the respondent alleged at trial belonged to petitioner, had recent evidence of discharge. Thus petitioner was not prejudiced by any failure of his attorney to hire a ballistics expert. See also Stubbs v. Thomas, 590 F. Supp. 94 (S.D.N.Y. 1984) (defendant entitled to reasonable assistance of court-appointed investigator in order to establish a claim; however, defendant must, pursuant to Strickland, prove both 1) ineffective assistance of the investigator and 2) prejudice).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JOSE SALDANA, :

Petitioner, : 84 Civ. 5254 (VLB)

-against- : MEMORANDUM ORDER

STATE OF NEW YORK, :

Respondent. :

----------X

VINCENT L. BRODERICK, U.S.D.J.

Jose Saldana has petitioned this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This case is currently before me on respondent's motion to dismiss due to petitioner's failure to exhaust his state court remedies.

I.

Petitioner was convicted in Supreme Court, New York County, after a jury trial, of attempted murder in the first degree, assault in the first degree,

criminal possession of a weapon in the second degree and criminal possession of stolen property in the third degree. Petitioner was sentenced as a predicate felon to concurrent prison terms of from twenty-five years to life on the attempted murder charge, seven and one-half to fifteen years on the assault and weapon charges, and one year for the stolen property count. These sentences were to be consecutive to a federal sentence petitioner is serving. Petitioner appealed to the Appellate Division of the New York State Supreme Court, First Department, and his conviction was unanimously affirmed without opinion on January 12, 1984. Leave to appeal to the New York Court of Appeals was denied on March 12, 1984.

Petitioner filed this habeas corpus petition on June 18, 1984. In it he

presents four grounds for relief. They are: 1) the prosecution failed to provide petitioner with exculpatory evidence; 2) ineffective assistance of counsel due to counsel's absence from a calendar call, and the alleged failure to hire a ballistics expert; 3) denial of the right to argue his appeal orally; and 4) denial of due process and a fair trial by the trial court improperly amending a stipulation the parties had agreed to, and through improper comments by the prosecutor during opening statements and summations.

I ordered the State to respond to this petition, and to provide all relevant transcripts and briefs on appeal. The State provided the transcripts and briefs, and has brought this motion to dismiss, claiming that petitioner failed to exhaust

his state court remedies with respect to two of his four claims.

Petitioner submitted a letter dated October 10, 1984, maintaining in substance that he is unable to respond to the State's motion intelligently, and requesting the appointment of counsel to meet the State's objections.[1] Since, as appears below, it is necessary in any event to dismiss the petition, the application for appointment of counsel is denied.

II.

A federal court is normally barred from the consideration of a state habeas petition on the merits unless state remedies have been exhausted with respect to all claims presented. Rose v. Lundy, 445 U.S. 509 (1982). This bar does not apply however, if the unexhausted claims are frivolous -- that is, if they do not

assert violations of cognizable federal constitutional rights. Allen v. Perini, 424 F.2d 134 (6th Cir.), cert. denied, 400 U.S. 907 (1970); Campanale v. Harris, 724 F.2d 276, 278 n.2 (2d Cir. 1983).

I move, therefore, to a consideration of whether state remedies have been exhausted with respect to the claims set forth in the habeas petition.

With respect to petitioner's first and second claims for habeas corpus relief, state remedies have been exhausted. With respect to the third claim (see infra, Section III), state remedies have not been exhausted. Petitioner's fourth claim for habeas corpus relief (see infra, Section IV) is frivolous, regardless of whether petitioner has exhausted his state court remedies.[2]

III.

Petitioner obtained leave in state court to proceed pro se on his appeal to the Appellate Division. Petitioner's third claim in the habeas corpus petition before me is that he was denied equal protection of the law by being denied the right to argue orally before the Appellate Division.

Petitioner's claim may have some merit, but he has not exhausted his state court remedies. In petitioner's motion to the Appellate Division he states "that the interest of justice and fairness would be serve[d] by granting him the right extended to other appellants who are represented by counsel . . . Appellant submits that he should not be denied oral argument simply because he has chosen the right to appeal pro-se." Exhibit 11 to Petitioner's Petition, Motion dated April

4, 1983. Petitioner cited the state court to no state or federal cases in making this claim,[3] and a federal constitutional claim with respect to the failure to allow petitioner to argue orally before the Appellate Division never was presented or passed upon by the state courts.

It is only on this petition, without citation, that petitioner claims denial of equal protection of the law with respect to the failure to permit him to argue orally before the Appellate Division. This federal constitutional issue was not presented to the state courts and thus this claim has not been exhausted.

I have considered seriously whether this third claim is frivolous. Petitioner chose to proceed pro se on his state appeal. He was afforded the opportunity to present a brief, and did so. That may be all that is required to satisfy the

equal protection clause. See, e.g., People v. Emmett, 306 N.Y.S.2d 433 (Ct. App. 1969); People v. Hall, 347 N.Y.S.2d 16 (Ct. App. 1973).

I hesitate to reach that conclusion at this stage, however. While the right to an appeal is not a constitutional right, but one conferred by statute, Abney v. United States, 431 U.S. 651, 656 (1977), the state has the obligation to afford all persons equal rights. If such rights are denied, the state must do so on a basis that is uniform and non-arbitrary, and pursuant to procedures that are consistent with the concept of due process. See, e.g., Federal Communications Commission v. WJR, the Goodwill Station Inc., 337 U.S. 265 (1949); Mildner v. Gulotta, 405 F. Supp. 182, 214-215 (E.D.N.Y. 1975), aff'd, 425 U.S. 901 (1976); George W. Bennett Bryson & Company Ltd. v. Norton

Lilly & Company, 502 F.2d 1045 (5th Cir. 1974); National Labor Relations Board v. Local No. 42, International Association of Heat and Frost Insulators, 476 F.2d 275 (3d Cir. 1973).

If petitioner was arbitrarily denied the leave to argue his case orally, and if others, represented by counsel, are granted such a right without question, then petitioner may be presenting a claim that does implicate a violation of his equal protection rights. On the other hand, the court may have denied petitioner's application due to some procedural defect. See, e.g., Supreme Court, Appellate Division, First Department Rules of Court, §§ 600.8; 600.11 (as amended August 1, 1983). The state courts must be afforded the opportunity to address these constitutional claims in the first instance.

IV.

Petitioner asserts in his fourth claim that the trial court improperly read a stipulation to the effect that the vehicle in which petitioner was seen riding was stolen, and that the improper reading violated his due process rights and rights to a fair trial. Petitioner asserts that he agreed to a stipulation that the car was stolen to keep from the jury the fact that the owner of the car died contemporaneously with the theft of the vehicle, thus avoiding any prejudice which might have attached had the jury acquired such knowledge.

When this issue came up in the course of the trial, there was an off-the-record discussion between the trial court and counsel. Thereafter, the following took place:

The Court: All right, after conference at the bench, it is stipulated and agreed between the people and defense, both sides of which have asked me to make this stipulation for the record:

That these three keys are keys for an automobile. That these three keys belong to a gentleman by the name of Martin Richardson now deceased; that --

Mr. Aiges [petitioner's attorney]: Objection. Objection.

The Court: You want to come up?

Mr. Aiges: Yes.

[Bench conference, off-the-record.]

The Court: Let me start the stipulation all over again. People's 43 for Identification consists of three car keys and a piece of plastic which contains Russ' Chevron Service thereon; that these three car keys belong to or belonged to a gentleman by the name of Martin Richardson, who is now deceased. His being deceased has absolutely nothing to do with this case and has absolutely nothing to do with anything at all to do with this case.

You all understand that? No inference can be drawn one way or another with respect to his being deceased. He is deceased.

That he was in possession of these three car keys on June 6 or June 7, 1979: that on or about June 6 or June 7, 1979, Mr. Richardson had stolen from him the blue Malibu '76 Chevrolet about which there has been testimony, the car which was parked by the lot.

You all recall that, do you not? At the same time that the blue Malibu was stolen from Mr. Richardson on or about June 6 or June 7, 1979, these three car keys were in his possession and were also stolen from him. And these three car keys are keys to a car which Mr. Richardson had in addition to the '76 blue Malibu.

You all understand that?

So stipulated?

Mr. Wallach [co-defendant's attorney]: Yes, sir.

Mr. Aiges [petitioner's attorney]: So stipulated.

The Court: So stipulated?

Mr. Murray [Assistant district attorney]:
Yes, Your Honor.

Tr. at 1000-02.

Petitioner, in his brief on appeal, maintained that "for the Trial Court to amend appellant's stipulation to contain a statement that the owner of the car in question is de[c]eased violated appellant's right to due process of law and a fair trial." Brief for Appellant before the First Department at 36.

The trial record set forth above does not support petitioner's position. After a bench conference, a stipulation was read to the jury -- defense counsel objected, another conference was held, and the stipulation was read in full to the jury. Included in it was the admonition that the fact that the owner of the car was deceased was to play no role in the jurors' minds, and that it was not an

issue. The trial judge then assured himself that all counsel consented to the stipulation, and such consent is evident on the record. Indeed, in discussing the introduction of the car keys at a later stage in the proceedings, petitioner's counsel indicated that he had no objection to their introduction, since there was a stipulation:

> The Court: All right. With respect to 43 for Identification, three car keys, there has been a stipulation, concession entered into by both sides.
>
> Is there any objection to the introduction of those car keys?
>
> Mr. Wallach: No.
>
> The Court: Mr. Aiges?
>
> Mr. Aiges: We have a stipulation, and I have no objection.

Tr. at 1010.

By the nature of defense counsel's objection, it appears that petitioner did not want information with respect to the death of the owner of the car in front of the jury.[4] There may have been a misunderstanding between petitioner and his counsel, or there may have been a misunderstanding between his counsel and the judge:[5] in any event, the information reached the jury. The trial judge, upon objection by petitioner's counsel to the mention of the word "deceased," immediately gave limiting instructions to the jury, to the effect that Mr. Richardson's demise was not its concern. Defense counsel did not object to the trial court's handling of the situation.

In light of the background of the issue, and the trial court's immediate and commendable handling of a potentially troubling event, I find that petitioner's

claim of a violation of due process is frivolous. The trial court's action avoided even the slightest possibility of such a violation. See also United States v. Cicale, 691 F.2d 95, 107 (2d Cir. 1982), cert. denied, 103 S. Ct. 1771 (1983).[6]

V.

Petitioner's petition is denied without prejudice. Petitioner may return to the state courts and exhaust his state court remedies with respect to his third claim. If petitioner is unable to obtain satisfactory relief in the state courts, once he has exhausted this claim in the state courts, he may submit a petition which includes all claims that he has exhausted. In the alternative, petitioner may resubmit his petition immediately with just his first two claims for relief. I caution petitioner that if he resubmits

his petition with the first two claims, and later files a petition containing his third claim, that subsequent petition may be dismissed if the court finds that it is an abuse of the writ. See 28 U.S.C. § 2254 Rule 9(b).

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
January 31, 1985

Footnotes

1 Petitioner's letter is dated September 10, 1984, and postmarked October 12, 1984. In light of the fact that the state's motion was not served by mail until September 28, 1984, I am assuming that petitioner intended to date his letter October 10, 1984, and will treat it in the record of this case as petitioner's October 10, 1984 letter.

2 Petitioner also raises prosecutorial misconduct as a ground for relief within Claim IV. Petitioner's state court remedies with respect to this ground have been exhausted, and are not frivolous. I am precluded from addressing them on the merits, however, for the reasons set forth in the text of this memorandum order.

3 At the beginning of his state appellate brief petitioner alerted the appellate court to the fact that he had requested an order that he be transferred to a facility with New York law books, or that he be provided with such books. This application was denied in an order dated June 24, 1982.

4 Were I to find that a possible constitutional deprivation had occurred with respect to this claim, and if I were otherwise in a position to consider the claim, I would hold an evidentiary hearing to fill out the record where such information is lacking. In light of my holding that this claim is frivolous, there is no

Footnotes

(Footnote 4 continued from previous page) need for an evidentiary hearing.

5 The discussions of petitioner's counsel with the prosecutor and the judge were not recorded, and therefore I have no record of those discussions.

6 Even if I were to find that this claim has merit, and that it has been exhausted, I would be precluded pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977), from considering it. Defense counsel agreed to the stipulation with the limiting instructions. If defense counsel had not agreed, then the trial court, with counsel's assistance, might have been able to devise a multitude of ways of dealing with the problem. By not objecting to the wording of the second stipulation, petitioner is now precluded from presenting this claim on federal habeas corpus review.

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of June one thousand nine hundred and

Present:

Hon. J. Edward Lumbard
Hon. James L. Oakes
Hon. George C. Pratt

Circuit Judges,

JOSE SALDANA,

Petitioner-Appellee,

-against-

THE STATE OF NEW YORK,

Respondent-Appellant.

Docket No.
87-2298

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is revised and the petition be and it hereby is dismissed in accordance with the opinion of this court.

Elaine B. Goldsmith
Clerk

by: Edward J. Guardaro
Deputy Clerk

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

87-2298

DATE	FILINGS - PROCEEDINGS
07-21-87	Copy of notice of appeal and district court docket entries on behalf of Appellant STATE OF NEW YORK filed.
07-21-87	Copy of district court judgment dated 07-15-87 filed.
07-21-87	Appellant STATE OF NEW YORK Form C filed (received 7/20/87).
07-21-87	Appellant STATE OF NEW YORK Form D filed (received 7/20/87).
07-21-87	Copy of receipt re: Payment of the docketing fee in the district court filed (received 7/21/87).
08-04-87	Scheduling Order #1 filed.
09-03-87	Appellant STATE OF NEW YORK brief filed. (w/pfs)
09-03-87	Appellant STATE OF NEW YORK appendix filed. (w/pfs)
09-04-87	Appellant STATE OF NEW YORK briefs received. (w/pfs)
09-04-87	Appellant STATE OF NEW YORK joint appendix received. (w/pfs)

87-2298

DATE	FILINGS - PROCEEDINGS
10-05-87	Appellee SALDANA brief received. (w/pfs)
10-05-87	Appellee SALDANA brief filed. (w/pfs)
10-14-87	Record on Appeal filed (original papers of district court).
10-14-87	Appellee SALDANA motion for leave to file an appendix filed. (w/pfs)
10-14-87	Appellee SALDANA appendix received. (w/pfs)
10-19-87	Appellant reply brief filed. (w/pfs)
10-20-87	State court proceedings logged. (Return to ROBERT M. MORGENTHAU, District Attorney County of New York, One Hogan Place, New York, New York, 10013, Attn.: ANN M. DONNELLY, ADA)
10-20-87	Order granting Appellee SALDANA motion for leave to file an Appendix filed; further stating that the Appellee may apply for costs. See, Karvelis v. Constellation Lines, 806 F.2d 4g, 54 (2d Cir. 1986).
10-20-87	Appellee SALDANA appendix filed. (w/pfs) (Originally received 10-05-87)

87-2298

DATE	FILINGS - PROCEEDINGS
10-30-87	Appellee SALDANA motion to strike part of appellant's reply brief filed.
10-30-87	Appellee SALDANA memorandum of law in support of motion to strike part of appellant's reply brief filed.
10-30-87	Appellee SALDANA appendix to memorandum of law in support of motion to strike part of appellant's reply brief filed.
11-04-87	Order denying motion to strike part of appellant's reply brief; granting motion to file sur-reply filed.
11-18-87	Appellee SALDANA sur-reply brief filed. (w/pfs)
12-11-87	Case heard before Lumbard, Oakes, Pratt, C.J.J.
03-31-88	Appellant STATE OF NEW YORK motion for a stay pursuant to Federal Rule of Appellate Procedure 23(c) filed. (w/pfs)
04-07-88	Appellee SALDANA affidavit in opposition to the motion by appellant STATE OF NEW YORK for stay pursuant to FRAP 23(c) filed w/pfs.

87-2298

DATE	FILINGS - PROCEEDINGS
04-07-88	Appellee pro se SALDANA affidavit in opposition to appellant STATE OF NEW YORK motion for stay pursuant to FRAP 23(C) filed w/pfs.
04-07-88	Appellee SALDANA memorandum of law in opposition to appellant STATE OF NEW YORK motion for stay filed w/pfs.
04-08-88	Order granting Appellant STATE OF NEW YORK motion for stay filed. (JEL, JLO, GCP, C.J.J.) (endorsed on a motion filed 3-31-88)
04-11-88	Certified copy of order granting stay pursuant to FRAP 23(c) issued.
06-27-88	Judgment REVERSED AND PETITION DISMISSED by published signed opinion (JEL)
06-27-88	Judgment filed.
07-11-88	Appellee SALDANA bill of costs received. (w/pfs)
07-14-88	Appellant STATE OF NEW YORK objection to Appellee SALDANA bill of costs received. (w/pfs)
07-19-88	MANDATE ISSUED (Opinion, Judgment)

87-2298

DATE	FILINGS - PROCEEDINGS
07-19-88	Appellee SALDANA letter in response to appellant letter dated 7-14-88 received. (w/pfs)
08-10-88	Order granting motion to disallow appellee's itemized and verified bill of costs, and appellee having submitted a reply, filed. (JEL, JLO, GCP)
08-10-88	Certified copy of order issued to the district court.

NEW YORK STATE CONSTITUTIONAL AND STATUTORY PROVISIONS

N.Y. Const. art. 1, § 6 provides in relevant part:

> No person shall be held to answer for a capital of otherwise infamous crime . . . unless on indictment of a grand jury. . . .

N.Y. Crim. Proc. Law § 190.50(5)(a) provides in relevant part that:

> 5. . . . a person has a right to be a witness in a grand jury proceeding . . .:
>
> (a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent.

N.Y. Crim. Proc. Law § 190.50(5)(c) provides in relevant part that:

> Any indictment . . . obtained or filed in violation of the provisions of paragraph (a) . . . is invalid, and, upon a motion made pursuant to section 170.50 or section 210.20, must be dismissed; provided that a motion based upon such ground must be made not more than five days after the defendant has been arraigned upon the indictment. . . . If the contention is not so asserted in timely fashion, it is waived and the indictment . . . may not thereafter be challenged on such ground.

N.Y. Crim. Proc. Law § 210.20(1)(c) provides that:

> 1. After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that:
>
> * * *
>
> (c) The grand jury proceeding was defective, within the meaning of section 210.35;

N.Y. Crim. Proc. Law § 210.35 provides that:

> A grand jury proceeding is defective within the meaning of paragraph (c) of subdivision one of section 210.20 when:

(1) The grand jury was illegally constituted; or

(2) The proceeding is conducted before fewer than sixteen grand jurors; or

(3) Fewer than twelve grand jurors concur in the finding of the indictment; or

(4) The defendant is not accorded an opportunity to appear and testify before the grand jury in accordance with the provisions of section 190.50; or

(5) The proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result.